

Intellectualism versus Voluntarism,
and the Development of Natural Law
from Zeno to Grotius.

by

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Statement by the Author

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Abstract

This study is concerned with the dialectic of the development of natural law theory from the third century B.C. to the beginning of the seventeenth century. Our thesis will be that this dialectic was driven by the tension between two alternative understandings of natural law: one, rooted in Stoicism, being an intellectualistic interpretation of law as human reason; and the other, rooted in the Old Testament, being a voluntaristic interpretation of law as God's command.

The Stoic exposition of natural law was marked by a change undergone between the early Stoics and the late Roman Stoics - from a repudiation of common moral norms to an embrace of them, as a result of the dialectic of development of the key Stoic notion of 'living according to nature' from the early Stoics' 'right reason of the sage' to Cicero's 'dictate of common reason' and Seneca's common moral precepts.

The alternative vision of moral law, as God's Commandments, and not as human reason, was rooted in legalism and voluntarism of the Old Testament. This Old Testament legalistic (anti-intellectualistic) voluntarism was transmuted, in Paul's hands, in the New Testament, into a new anti-legalistic (anti-intellectualistic) voluntarism.

The Church Fathers were divided over how to deal with the conflict between the Old and New Testaments' voluntarism and pre-Christian intellectualism. On one side, the anti-

legalistic voluntarism of Paul and Augustine denied the relevance for salvation of earthly works. On the other, the legalistic intellectualism of Irenaeus and Tertullian incorporated the Stoic 'dictate of common reason' into the legalism of the Old Testament, and asserted the inherent value of earthly life, and thereby natural law. The core Patristic divide was between the legalism of Irenaeus and Tertullian and the anti-legalism of Augustine, and it brought a new focus on the corruption of human will.

In Scholastic thought a new divide had emerged - between the new Aristotelian intellectualism of Aquinas, and the 'new legalistic voluntarism' of Scotus and Ockham. A new ontological issue was at stake - the place of the free will of God in Creation. For both sides, natural law was a dictate of right reason. Nevertheless, in the matter of epistemology, to the intellectualists, human reason in discerning natural law was 'by itself' participating in God's eternal law, whereas to the voluntarists human reason discerned only what God willed to make clear.

The late Scholastics attempted a new synthesis of intellectualism and voluntarism. Suarez' contribution was to separate the question of the content of natural law, as discerned by human reason, from the question of the source of obligation under natural law, as created by God's will.

The early modern Protestant natural lawyers, such as Hooker and Grotius, attempted to revive intellectuality, upholding of self-sufficiency of human reason. Nevertheless, they

still were unable to discard the voluntaristic question about the source of obligation under natural law.

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Chapter 1

Introduction

This study is concerned with the genesis and dialectic of the development of idea of natural law from the third century B.C. to the beginning of the seventeenth century.

Our thesis will be that this dialectic was driven by tension between two alternative understandings of natural law: an '*intellectualistic*' vision of it in human reason and a '*voluntaristic*' vision of in God's will. In the terms of origins one interpretation was rooted in Stoicism, and another in the Old Testament.

According to both *intellectualistic* and *voluntaristic* visions of natural law, men were made to live in society under naturally just laws. However, according to an *intellectualistic* vision of natural law, the naturally just laws of human society were to be discovered by human reason alone. According to a *voluntaristic* vision of natural law, those just laws, discovered by right reason, were confined to what God decided to make known. Moreover, an intellectualistic natural law was a demonstrative law of human reason obliging man's will as a rule of consciousness, while a voluntaristic natural law was a prescriptive law of the will of God as a Lawgiver.

1.1 Preview

The Stoics were the first to endeavor to uncover just human laws that were rooted not in convention, or expediency, but in nature. This notion became the kernel of the theory of natural law. The Stoics equated natural law with the right reason of the wise man, grasping the seminal reason, or *logos*, of nature as a whole. They originated the '*intellectualistic*' understanding of natural law: its interpretation as the rational order of things discerned by 'right reason' and applied to human life. Stoicism, however, faced an inner dilemma: was man meant to live in accord with the 'seminal reason' of universal nature (as Zeno seemed inclined to think) or in accord with his human nature, i.e., natural human inclinations, (as Chrysippus and Panaetius suggested)? The later Stoic concern with the ordinary human nature was amplified in Cicero's definition of natural law as a law of common reason true both now and then, and here and there.

The alternative to the Stoic '*intellectualism*' was '*voluntarism*', or the interpretation of (natural) law as the will of God with respect to man. This was the Old Testament view of the Law as the will of God revealed in God's Commandments. The Old Testament *voluntarism* was '*legalistic*' in as far as the obedience to God's will was to be shown in the outward works under the Law. The New Testament inherited the Old Testament *voluntaristic* vision of man seen in relation to the will of God. However, there was no easy absorption the Old Testament *legalistic voluntaristic* notion of the Law as God's Commandments into the main body of

Christian thought. The New Testament brought not only a new emphasis on inward inclination to follow God's will, in an apparent conflict with the Old Testament concern with outwards works, but also a new promise of salvation. Nevertheless, the Gospel of Matthew suggested the possibility of the new Christian *legalism* as a reinterpretation of the Law in accord with the new Christian inward commandments of love and forgiveness, preparing man to eternal salvation. In contrast, Paul transformed the Old Testament legalistic anti-intellectualism into a new anti-legalistic anti-intellectualism. Paul rejected the Old Testament legalism as a misleading guide to the main purpose of man's life - salvation. To Paul, salvation could not be obtained like in the Old Testament through God's judgement of man's work under the Commandments as eternal and glorious renewal of righteous earthly life. Paul fatefully originated an *anti-legalistic voluntarism*, with its whole emphasis on salvation as eternal life of the spirit by God's free grace, which had nothing to do with the doomed earthly life of the flesh. Paul was, in his own way, faithful to the late Old Testament prophesy that God's law would be written in the hearts of men, who walked by the spirit.

Nevertheless, Paul's celebrated reference to the law written in the hearts of the Gentiles outside of the Law had, at least, on the surface a resemblance to the later Stoic idea of natural law as common reason. Understood in this sense it provided the early Christian Fathers with the first Scriptural reference to natural law, with the 'state of nature' now meaning the Old Testament 'state of innocence'. The early Christian Fathers, such as Irenaeus or Tertullian, already saw the original natural law in human reason being 'written in the hearts' in the state of innocence. The concept of original sin provided the early Christian Fathers with the means to

understand God's given Commandments (the Old Testament Law) as a 'reminder' of the original natural law of human reason after the Fall. Thus, the early Christian Fathers originated the synthesis of the Stoic *intellectualism* and Old Testament *legalistic –voluntarism*.

Ambrose attempted to synthesize the Stoic *intellectualism* with the Pauline *anti-legalism*, which he reinterpreted in the sense of a Neoplatonic *intellectualism*. To him natural law became the right reason of a Christian wise man seeking the eternal salvation. Augustine carried the Pauline *anti-legalistic voluntarism* to its limits. To him, no law of natural life bore true justice after the Fall. As a result, the Pauline-Augustinian *anti-legalistic voluntarism* by denying the intrinsic value of the earthly natural life undermined the idea of natural law as such. Augustine contribution, however, was explicitly to spell out the voluntaristic idea of will as an inherent faculty of man, apart of reason. Augustine's emphasis on the will prepared the way to the subsequent Scholastic conflict of intellectualistic and voluntaristic ideas of natural law.

So the Patristic conflict was, in its essence, between the *legalism* of the early Christian Fathers and the *anti-legalism* of the later Fathers.

Scholastic Christian thought of the thirteenth and fourteenth centuries brought a new understanding of the conflict between *intellectualism* and *voluntarism*, with *intellectualism* accounted for the idea of the primacy of the intellect over the will either in God or in man,

while *voluntarism* stood for the primacy of the will over the intellect. At the root of the conflict was a dispute about the free will of God in creation.

Aquinas perfected the early Christian Father *legalistic intellectualistic* idea of natural law being the original human reason revealed in the Commandments after the Fall by means of the Aristotelian *intellectualism*. He provided essentially two visions of natural law. The one was a vision of natural law as ‘natural inclination’. The other was a vision of natural law as ‘evident knowledge’ which came near to yet another of his definitions of natural law as ‘natural justice’.

A reaction to the Scholastic Aristotelian *intellectualism* brought to life a new kind of Scholastic *voluntarism*, by Scotus and Ockham. They shared the early Christian *legalistic* vision of natural law as God’s Commandment as well as the *intellectualistic* vision of natural law as right reason. Why, then, it was ‘*voluntarism*’? It was *voluntarism* because it adhered to the *voluntaristic* postulate of the primacy will in God in respect of creation. The new *legalistic voluntaristic* vision of natural law assumed that man’s right reason, man’s ‘evident knowledge’, was ultimately dependent upon God’s will. To Scotus, the only necessary Commandment of right reason for intact human nature, or human nature in the state of grace, was to love God above all. In comparison, the second table of the Commandments was natural law, discerning by man’s right reason, as contingent by the state of human nature after the Fall. To Scotus, natural law as right reason reflected the inclination to justice, implanted into man’s will alongside with the inclination to self-advantage. To Ockham, only strictly ‘evident knowledge’, or right reason, constituted an absolute natural law. It was ultimately in God’s given rationality of human language discerning by man’s right reason, with the worlds, such as

‘murder’, or ‘adultery’, connoting a meaning of wrong. Thus, to Ockham, even ‘absolute’ natural law was contingent on God’s will. Besides, he recognized a less absolute natural law in the sense of natural justice of the state of innocence as God’s given natural right of the original *dominium*. Moreover, right reason as applied to the human conditions after the Fall dictated a further ‘conditional’ natural law.

The later medieval phase of the *intellectualists’-voluntarists’* controversy brought a new attempt of the *voluntaristic-intellectualistic* synthesis. Vitoria considered the *voluntaristic* idea that the force of command is rooted in the will of the lawgiver. His primary concern, nevertheless, was with Aquinas’ *intellectualistic* concept of natural law as ‘natural inclination’. Eventually Vitoria moved beyond his initial notion of natural power as merely ‘natural inclination’ and advanced an idea of man’s natural rights of the original *dominium* due to man’s gift of reason in the image of God. Suarez already explicitly adopted the *voluntaristic* prescriptive definition of natural law as God’s command. Suarez noted the insufficiency of an *intellectualistic* notion of natural law as demonstrative law of right reason, binding merely as a rule of conscience. His contribution was to distinguish the question of the content of natural law, discerned by right reason as ‘evident knowledge’, from the question of the source of the obligation to abide natural law. To Suarez, further, the commands of natural law obliging by God’s will were accompanied by the permissive natural rights of *dominium* determined by human will.

The early modern Protestant *intellectualists*, such as Hooker or Grotius, were concerned to defend the place of reason in human life. Nevertheless, they had their own brush with *voluntarism*. Hooker advanced Aquinas' vision of natural law as 'evident knowledge'. Still, he supplemented this *intellectualistic* concept of natural law by *voluntaristic* presumption of the enforcement 'law of reason' through the external sanction of positive law. Grotius attempted to revive the Stoic *intellectualism*. To him, natural law as right reason dictated the innate rules of justice, which moderated pursuit to self-advantage. Still, to him, God willed and created man with an inclination to human fellowship alongside with an inclination to self-advantage. He also implied in the *voluntaristic* mode that fear of the future punishment would help the adherence to natural law. Besides, to Grotius, the positive social compact would enforce the law of nations.

By the preceding narrative, the present study aims to bring attention to the logic of the development of natural law theory as the interplay of two concepts of law: law as human reason, and law as God's will. In the end, natural law was understood as discerned by human reason by both *intellectualists* and *voluntarists*. But *voluntarism* had the final say on the question of the ultimate source of man's obligation under natural law: in God's will. Suarez had a prophetic insight that the best hope for the unshakable validity of natural law as right reason would be in the faith that God would not deceive man in what He made once clear in His Commandments. In a sense, the famous claim of Grotius that even without God natural law would stand denoted not 'the end of the beginning' but 'the beginning of the end' of the idea of natural law.

1.2 Earlier Literature and the Present Contribution

This study is naturally indebted to the massive study of natural law by many scholars.

Stoic natural law has attracted significant new scholarship in recent decades, by, among others, Rist, Long, Striker, Schofiel, although the comparison of the Old Testament and the Stoic ideas on law has not been much researched.¹

At the same time, the relevance of the Old Testament to the New Testament has been a focus of an immense scholarship. The relevance of Old Testament was, of course, discussed by the Evangelists themselves and, then by the Church Fathers. In the modern era the Old – New Testament connections have been analysed in the context of the history of the Christian dogma by, among others, Harnack, Neibuhr, Gilson. The Judaism - early Christianity nexus, has over the years attracted the scholarship of, among others, Rust, Rowley, Night, Buber, Grant, Sanders, and Cohen. The related question of the sources of early Christianity have been extensively researched by, among many others, Dodd, Houlden, and more recently Mohrelang.

¹ However, there were the studies of more general comparison of Judaism with the Classicism, like one by Hengel, or with the primary focus on the Classicism, as by Dihle.

The Christian Fathers themselves have received decidedly unequal attention. Augustine has been, for centuries, the subject of the numberless studies, and in recent decades his political theory was illuminated, in particular, by Dean. But philosophical bequest of Ambrose in respect of natural law has not attracted the notice it deserved. Further, relatively few scholars have focused on the early Fathers' natural law ideas, like Irenaeus and Tertullian, Osborne being one of a few.

With respect to Aquinas' natural law, Gilby's and Armstrong's contributions still stand out, as does Wolter's distinguished scholarship in respect to Scotus, and Leff's, McGrade's, Adam's and Kilcullen's, in respect to Ockham. The analysis of medieval natural law has also benefitted from the last century attempts to revive a theory of natural law².

The interest in the Scholastic natural law has been stimulated by the renewal interest to the idea of natural right.³ Thus, Tuck's important study underlined the relation of an idea of natural right to the notion of *dominium*.

² The so called "neo-scholastics", of whom the best known is Maritain, attempted to revive Aquinas' understanding of natural law as "natural inclinations". In response, the so-called "neoclassical" theorists, such as Grisez, claimed that the true Aquinas' natural law was a law of "practical reason", a sort of evident knowledge, without reference to the specific concept of 'nature of man'. Such vision of natural law as unspecified 'basic goods' (akin to the Classic virtues) was criticised as undermining the foundation of natural law doctrine as seen through the precepts.

³ The debate was partly inspired by Villey, who argued that the modern, subjective concept of rights had its roots in Ockham's vision of right as subjective power to act (constrained only by the positive law). The subsequent discussions brought a new light to the conflict between the "subjectivism" of Ockham and "objectivism" of Aquinas. Villey claimed that the subjective notion of rights was unknown in the Roman Law. Tuck, while agreeing that the genesis of the concept of right lay in fourteen century debates over the Franciscan poverty, argued that "subjective" right (*ius*) originated in the notion of *dominium*. Tierney, in his turn, credited the notion of right to the twelve century theorists of Canon Law. Brett, while sympathizing with Villey's thesis that Ockham was subsequent to the new subjective notion of right, conceded, that Ockham did not succeed in the task. In contrast, in Finnis' view, rights, in Aquinas' 'objective' mode of thinking could be understood as duties to oneself.

With respect to the late Scholastic and early modern era natural law, in recent years Vitoria has received a new attention, from Brett or Tieney, as has Suarez from Haakonssen and Tierney. Hooker's natural law views, though not neglected the past (Munz), has recently inspired some new interest, such as that by Kirby. Over the last few decades Grotius has attracted a massive interest from, among others, scholars such as Tuck, Buckle and Haakonssen.

Nevertheless, the existing literature has not exhausted all aspects of the development of natural law. The present study brings out some issues that have tended to be on the edge of vision of most previous studies. It throws light on the unexplored question of how the intellectualistic Stoic natural law was transformed in the hands of the early Christian Fathers into the Old Testament-inspired vision of natural law as God's Commandments. It also brings attention to the crucial significance of the Old Testament legalistic-voluntaristic vision of the Law (and its conflict with Paul's anti-legalistic agenda) for the development of Christian natural law. Further, the present study traces how the early Fathers' vision of the Old Testament Commandments as a 'remainder' of the original law of reason after the Fall became the orthodox medieval view, in spite of its conflict with the Augustinian – Pauline voluntarism. The study also underlines the new nature of the medieval conflict between intellectualism and voluntarism, in contrast with the Patristic natural law divide between legalism and anti-legalism. The study also favorably reassesses the late Scholastic contribution in separating the intellectualistic question of the content of natural law from the voluntaristic question of the source of the obligation under natural law. The late Scholastic thesis of insufficiency of a pure

intellectualistic concept of natural law as binding rule of conscience has been also vindicated by the analysis of the early modern intellectualism. In respect to the concept of natural right, the present study defends Tuck's view that the concept of natural right originated from the notion of *dominium*. It strengthens this view through the analysis of the notion of the original *dominium* as rooted in the early Fathers intellectualistic Stoic - voluntaristic Old Testament synthesis of the idea of man made with reason in the image of God. Finally, in respect of the development of another offshoot of doctrine of natural law - social contract theory the present study underlines the inner contradictions of the Aristotelian intellectualism.

Chapter 2

Stoic Natural Law

Introduction

The Stoics developed the idea of natural law from the time of Zeno (of the third century B.C.) to Seneca (of the first century A.D.). This chapter is concerned with the origin and transformation of the Stoic *intellectualistic* vision of natural law as a law of right reason over that period. Consequently, it has two foci. The first is upon the early Stoic understanding of the law of nature as that grasped by the ‘right reason’ of the wise man, the ‘sage’, who was capable of living ‘in accordance with nature’ without relying on common moral conventions. The second focus is on the eventual transformation of the Stoic vision of natural law - from Zeno’s repudiation of common morality to the late Roman Stoic embrace of it. Our thesis is that this transformation reflected a disintegration of Zeno’s vision of ‘living in accordance with nature’ as right reason of the sage in tune a seminal reason of universal nature; a vision that was undermined by Chrysippus’ and Panaetius’ new vision of ‘living in accordance with nature’ as inclinations of human nature.

The main contribution of this chapter may be seen as putting into sharp relief the eventual failure of the early Stoics’ intellectualistic concept law of nature as the right reason of the sage. The chapter also brings out the logic of the Stoic concept of the law of nature as a never failing law as rooted in the Stoic *pantheism, corporealism and determinism*. As a result, the early Stoics’ law of nature was a seminal reason of a universal nature, or *logos*,

as grasped by the sage's right reason. Thus, the sage was able to perceive a true reason behind every chain of events, and was beyond common moral conventions. This vision led a conflict between the ideas of universal nature and of human nature. The concept of the sage preoccupied with the *logos* of universal nature began to disintegrate in the hands of Chrysippus and Panaetius, who were concerned with the natural inclinations of man himself. As a result, the intellectualistic unity of the early Stoic thought began to crumble. This inner tension was noted by Posidonius as a conflict between ideas of 'universal' nature, as manifested in the sage's right reason in tune with *logos*, and of human nature, as manifested in an animal like, but not rational, inclinations. The concept of the sage with his superior right reason was *de facto* abandoned by the later Roman Stoics. Thus, Cicero defined natural law as a dictate of common (!) reason, which manifested itself in the Roman archaic morality. And Seneca emphasised the teaching of moral precepts as 'an approximation' of natural law for an ordinary man. Cicero's novel definition of natural law as common reason, as well as Seneca's insistence upon moral education of ordinary man in the prevailing conditions of corruption, prepared the way for the early Christian vision of natural law as a law of the original human reason revealed as God's Commandments after the Fall.

The first section provides an overview of the Stoic picture of nature, law and rationality. The second section will explore the application of Zeno's intellectualistic concept of the law of nature as the right reason of the sage. The third section will examine Chrysippus' view of the naturalness of human inclination to self-preservation, and Panaetius' widening of the notion of natural inclinations to embrace the inclination to justice, as well as the

criticism of idea of natural inclinations by Posidonius. The fifth section will appraise Cicero's intellectualistic definition of natural law as a dictate of common reason, which reflected his attempt to provide a rationale for the customary Roman morality. The final section will centre on Seneca's emphasis on natural law as common moral teachings and his assimilation of Posidonius' vision of the lost of golden age of the original innocence.

1. The Stoic Conception of Nature, Causality and Human Rationality

This section will be concerned with the overall Stoic vision of nature which led to the early Stoic intellectualistic concept of law of nature as the sage's right reason.

1.1. Background to Idea of Natural Law

There were the two opposing Hellenistic views on law and nature. One, going back to the Sophists, the Cynics and Plato, underlined the contrast between nature and the conventional morality. The second, going back to the archaic Hellenistic beliefs, reported by Sophocles, saw the basic moral conventions as a reflection of divine law.

Before the Stoics, from the second part of the fifth century BC, the Sophists, Plato and the Cynics all appreciated the antithesis between *physis* (nature) and *nomos* (convention) (Watson, 1971, 218). Thus in the *Gorgias* of Plato (483A7-484C3) Callicles claimed that by the law of nature the strong would prevail over the weak, and the laws (of the people)

were only convention contrived by weaklings who constituted a majority of mankind (ibid.). Probably here the expression ‘law of nature’ (483E6) was used for the first time (Striker, 1996, ‘Following nature’, 249). The meaning was of an intentional paradox, with ‘law’ and ‘nature’ taken to be opposites (ibid.).¹ To the Sophists a law (*nomos*) was a man-made convention, and as such was opposed to nature (*physis*). Thus Antiphon claimed that laws were artificial compacts that lacked the inevitability of nature (Weinreb, 1987, 27-8). In the Cynics’ view a life in accordance with nature was liberation from any convention. Since human reasoning was only too prone to err, animals preserved the natural state better than man (Watson, 219). So Diogenes rejected ‘civilized’ life of society and opted himself for the return to the ‘original’ primitive conditions.

But were all existing laws man-made? As Sophocles’ tragedies testified, there also existed an archaic Hellenistic belief that some unwritten laws were divine prescriptions, and, as such, opposed to mere convention (Weinreb, 29). Such divine laws were seen as originating from nature (*physis*), i.e. from Gods themselves. When Antigone defied Creon on the grounds of the unwritten divine law demanding the respect for the relative’s dead body, her vindication by means of the punishment of her persecutor Creon was inevitable. King Oedipus moved irreversibly towards his own destruction by breaching of divine prohibitions of incest and parricide. Unknowingly, he killed his own father Laius and

¹ In comparison, Aristotle’s opinions in respect of relation between nature and law were not very consistent (Kelsen, 1980, 91-9). Man was engendered with ethical virtue not by nature but by habit. (In contrast a stone could not be habituated to move upwards, or fire to move downwards. *Nicomachean Ethics* 2.1:1103a11-33). Still, Aristotle referred to the opinions of some that justice should be unchangeable and have every where the same force (just as fire burns both here and in Persia) (5.7: 1134b18-1135a5). To him it might be true, in a sense, that some things in respect of man were just by nature, and yet were changeable (ibid.) Nevertheless, in *Politics* Aristotle famously mentioned that the state was a creation of nature, and man was by nature a political animal (1.2:1253a1-3).

married his own mother Iocasta. A blind fate and the unfailing punishment of the transgressors were (paradoxically) tied together. Fate was a manifestation of the work of divine laws. So the punishment against transgression of divine law was inevitable, even if the transgression was accidental. Such unwritten divine laws were above any written laws: neither man could change them nor escape punishment when they were transgressed.

The seeds of a similar vision of law could be found in Socrates' dialogue with the Sophist Hippias in Xenophon's *Memoirs of Socrates* 4.4.19-21. After consenting that some laws were unwritten, valid everywhere and established by the gods, Socrates and Hippias continued their dialogue.

'So, then, is it also a law everywhere to honour one's parents?'

'Yes'

'And therefore neither for parents [are] to have sex with their children nor children with their parents.'

'In this instance, Socrates, this does not seem to be a law of gods.'

'Why?'

'Because I notice that there are some who transgress it,' Hippias replied.

'Indeed, they violate many other laws as well. But those who transgress the laws founded by the gods have paid a penalties that no man can escape in the way that some transgressors of man-made laws escape...'

Here Socrates took Sophocles' line. Divine laws were the unwritten, but common, laws of morality. They were from the gods, because whoever violated them would not escape divine punishment. To Socrates, as becomes clear in the later part of dialogue, this was not

a direct divine vengeance, such as the plague sent upon Thebes, but a more indirect retribution, such as, for example, procreating badly or losing friends. No less revealing were Hippias' doubts. To him law of nature never failed if nobody could physically transgress it. The 'preconception' of Hippias that the true law would never fail was an illuminating one. Unsurprisingly, Hippias hesitated to give widely accepted moral conventions a status of law of nature, since there were numerous cases of their transgressions.

In summary, there was an archaic Hellenistic idea of divine law as commonly recognized moral law. So the archaic moral 'conventions' had the status of divine law. The transgressor of such law was under ever a present threat of divine punishment. There was, besides, the sceptical views of the Sophists, who doubted that any human convention could have a source in nature, and not in a sheer convenience. There was, moreover, the Cynic idea of nature outside of any human conventions. To the Cynics, 'living by nature' amounted to a primitive asocial life.

1.2 Stoic Intellectualism: Pantheism, Corporealism & Determinism

The notion of 'natural law' was a Stoic invention. The Stoics used the terms *nomos* and *physis*, which meant to have the opposing meanings, in the new sense of 'law of nature', although the early Stoics did not actually use the term 'natural law' (*nomos physeos*) (Vander Waerdt, 1994, 274).

The early Stoic idea of natural law was more like that of the Cynics (and Sophists) than that of Socrates and Sophocles. The Stoics shared the Cynics' contempt for man-made laws, but without sharing their anti-intellectualism. The Stoics believed in the right reason of the sage as a manifestation of a universal reason (*logos*) pervading nature. The Stoics' originality was to apply the idea of natural law to man, with right reason being a kind of personal 'lawgiver' (Striker, 1996, 'Origin of the Concept of natural law', 210). While the Cynics were prepared to go 'beneath' convention (and discard rational nature of man for sake of his 'animal' nature), the Stoics were inspired to rise 'above' convention to embrace right reason as a law of nature dictating a true law of society. The notion of right reason (*orthos logos*) was used by Aristotle. He associated it with practical wisdom, a rational capacity to act with regard to human goods (*Ethics* 4.13.1144b20-29, 4.5.1140b6-30). The Stoics, however, did not follow Aristotelian division of reasoning on practical and contemplative.

The Stoic vision of 'nature' and 'law' as bound together was rooted in the Stoic 'pantheistic' understanding of nature. The world (cosmos) was a living body, endowed with soul and mind.² Zeno (333-262 BC), the founder of the Stoicism, said (as reported by Sextus), that 'the whole' was a living creature. The argument (related by Cicero) was that nothing inanimate and irrational could generate a being animate and rational (Hunt, 1976, 35). The animate body was held 'in unity' by its soul (Hunt, 1976, 32). To Zeno the soul was a warm *pneuma* (breath); which animated and moved the body (Diogenes Laertius 7.156-7). The Stoics identified this force of *pneuma* with a god (Sambursky, 1959, 36-7). God, as the seminal reason, or *logos*, was the source of the pattern of all that happened

(Horowitz, 1974, 10-1).³ *Logos* proceeded like a craftsman to recreate (cyclically) the *cosmos* from everlasting primary matter (Hunt, 8-19, 29). As a result ‘the law of nature’ and ‘seminal reason’, or ‘*logos*’, were seen by the Stoics as synonyms.

The Stoic idea of *cosmos* as a living body reflected a general Greek pantheism, where, as Sambursky put it, ‘the concepts and pictures of biology were projected into a realm of the physical world, thus transforming a *cosmos* into a living organism’ (Sambursky, 1959, 27). The Stoic concept of nature as a living being embraced under the same causality animated as well as non-animated nature. The Stoics, thus, had to have a concept of natural law that described the animated and rational world without undermining their concept of overall causality. If seminal’ (universal) reason (*logos*) ordained the natural course of events down to the smallest detail, then even the events apparently contrary to the nature of particular species (i.e. human nature) were, in fact, in accordance with universal nature (Vander Waerdt, 1994, 299).

The particularity of Stoic pantheism was its extreme ‘corporealism’. This was underlined by their concept of causality, according to which everything capable of acting and being acted upon was a body, and all physical events were transmitted either by direct contact of bodies or by *pneuma* (Sambursky, 1959, 52-3). The Stoics believed only in the existence of material objects none of which was identical to any other (Long, 1971b, 91). Thus, to them there no separate world of the Forms (and no separate ‘contemplative’ intellect distinct

² Nature, in a more strict sense (*physis*), was what sustained the world, a self-moving drift, that completed and sustained its products in accordance with seminal reason (Diogenes Laertius 7.148-9).

from ‘practical’ one). As result of the corporeal nature of cause ‘the whole Aristotelian order was turned topsy-turvy, because now it was no longer Form that was the ultimate principle which determined and explained everything else, including motion, but motion itself was supposed to explain Form’ (Sambursky, 1959, 86). Figure 1⁴ From Aristotle’s four causes of change (that were material, formal, efficient and final causes) only external (antecedent) material and internal causes were explicitly recognised by the Stoics, with the internal cause as a sort of ‘merger’ of the efficient, formal and final causes (Hahn, 1977, 44).⁵

The Stoic concept of causality distinguished the external cause as determined by the environment from the internal cause dependent upon the rational perception. The interplay of the internal and external causes could be illustrated by Chrysippus’ example of a drum placed upon a slope. So the first cause of the movement was external but the continuing movement was dependant upon its peculiar shape (Long, 1971b, 186).

The Stoic account of human action included perception (*phantasia*), the assent (*synkatathesis*) to it, and the impulse to act (*horme*) (Striker, 1996, ‘Sceptical Strategies’,

³ Zeno (in Tertullian’s testimony) understood God, or *logos*, as the creative force of world, and nature, in due order (Hunt, 1976, 27).

⁴ To the Stoics ‘forms’ were simply concepts (*phantasmata*), arising in the mind, and which were neither existent nor qualified entities, but the mere likeness of the real material objects (Rist, 1971, 49).

⁵ The Stoics’ acceptance of only two causes (not the four of Aristotle) could account for their more ‘physical’ (i.e. situation determined) rather than ‘biological’ (purposeful) rationality. To them there could not be any incorporeal ‘form’ inherited in a ‘particular’. They lacked Aristotle’s secondary substances (such as species and genus distinct from the primary individual), as well as his incorporeal unmoved first mover (Hahn, 1977, 7-9, 13-4.). As a result, the *corporeal* ‘mechanical’ nature of the Stoic causality did not provide scope for ‘biological’ (Aristotelian purposeful) rationality.

109).⁶ Assent was given upon rational perception (*kataleptike phantasia*) as a valid grasping of existing reality (Hunt, 1976, 63-4).⁷

The capability to assent to rational perception meant for the Stoics the following of right reason and wisdom. The recognition of assent as a necessary part of action distinguished the Stoics from their opponents, the Sceptics. The latter, like Carneades, maintained that the wise man, as a true Sceptic, would never assent to anything (Striker, 1996, 'Sceptical Strategies', 109-10). To the Stoics, any valid perception was based on an external objective reality, so by right reason the sage reached an infallible understanding of the universal nature (Hunt, 1976, 64-5).⁸ Without the possibility of expressing an external reality, to 'live according to nature' would be for the sage, in Long's words, 'a vacuous and impossible command' (Long, 1971a, 96).

So the sage was the only true logician (Long, 1971a, 104). The non-sage, or the fool, in contrast, was vulnerable to false judgement of the intellect when affected by some sort of instability. This resulted in the impulse towards wrong action (Dihle, 1982, 58, 62). Any

⁶ For Zeno the deciding factor in perception was the external object, and the effect of stimulus travelling inwards. (Sense) perception was understood (in Galen's account) to be an external stimulus, transmitted to the central part of the soul *hegemonikon* (Hunt, 1976, 61). Chrysippus emphasised the activity of the central part of mind, the *hegemonikon*, from which currents (*pneumata*) travelled onwards to the senses, seizing the stimuli received and carrying the messages to the *hegemonikon* (id., 68-9).

⁷ In the majority of cases an assent to a proposal of action depended on the [rational] perception that it was in accordance with the man's nature, though there could be immediate sense-perception, with the things immediately recognised and assented as appropriate (Striker, 1996, 'Sceptical Strategies', 106). In infancy all perceptions came from external stimuli (Hunt, 1976, 62). The later perceptions might be caused by thought, imagination and reasoning in general; assent to them depended upon the rational perception in the light of the past experience (id., 62-3).

⁸ The sage mirrored in his disposition and actions natural law of cause and effect, since the right action would necessarily be based upon the understanding of natural events, sage's possession of truth would enable him to draw out consequences from the present and act accordingly (Long, 1971b, 101).

moral corruption, as a misjudgement of value, was merely a faulty assessment of the facts on the part of a non-sage lacking right reason.

Thus, the Stoic concept of action triggered by the mind, had the purely *intellectualistic* meaning of the comprehension of events in their natural causality. There was no genuine notion of free will, beside that of the assent of mind. So the sage, who lived in accordance with right reason, and who rationally perceived and rightly assented, was free. As far as the chain of events was outside of his control, the only thing which the sage had left free to control was his own emotions. Over external events man had no power, but he had power to accept it, as Epictetus taught. To will was to adopt a ‘pro’ attitude to some object, i.e. to assent, with the object being given as necessary (Long, 1971b, 192). Every event was necessarily linked to some external (antecedent) cause and thus outside man’s internal control (id., 180). Further, every event was itself a cause of something else (id., 182). The internal cause, to receive the assent of right reason, was also predetermined by the external flow of events.⁹ Man could no more fail to act humanly than a stone could fail to fall if dropped from a height (ibid.). Thus, the Stoics’ intellectualistic ‘corporeal’ notion of causality led them into ‘determinism’.

In summary, due to the Stoic corporealism and determinism the sage’s right reason, in tune with *logos*, was in a sense, akin to the early-modern notion of the natural science laws (such

⁹ Human nature was fated in the sense that basic capabilities with which a man was born were determined by external causes (Long, 1971b, 181). Moreover, a man, being born morally neutral, acquired his disposition (his character) in the result of upbringing, i.e. of external cause, and in this sense again by something out of man’s control (id., 184).

as laws of celestial mechanics), representing ‘never-failing laws’ of corporeal nature.¹⁰ It was as if, with a help of right reason, the sage was able to interpret a rare result of ‘physical experiment’ as consistent with a ‘general theory’. As result the early Stoic natural law had no connotation to a set of infallible moral rules (Vander Waerdt, 1994, 299). A law (*nomos*) referred to the sage’s right reason, but not to the law as convention (id., 276).

2. The Sage’s Right Reason of Universal Nature, and Zeno’s Protest Against Conventional Morality

2.1. Life in accord with Nature through Right Reason

Zeno, according to Stobaeus, defined the end (*telos*), as a life lived with internal consistency, according to a single harmonious pattern (Rist, 1977, 161, 168). Did Zeno’s ‘internal consistency’ imply a life in accord with right reason, and in tune with the *logos* of universal nature? Cleanthes, the next head of Stoa, spelled out ‘consistency’ as living in accord with nature; whereas Diogenes Laertius reported that Zeno himself mean living in accord with nature which guided to virtue (7.87; Rist, 1977, 162, 167-8). Cleanthes also remarked that all men had the starting points for virtue given by nature (id., 170).¹¹

¹⁰ In comparison with the notion of causality of the modern science, the Stoics lacked the concepts of artificial isolation and wilful recurrence, as derived from the systematic experimentation (Sambyrsky, 54).

¹¹ In Rist’s view, Zeno had in mind consistency ‘with the natural behaviour to which our first impulses guide us’ (Rist, 1977, 170) Rist understood the concept of ‘universal nature’, as implying ‘our first impulses to self-preservation....which subsumes and indeed engenders the specifically human sphere’ (id., 168). But such broad interpretation left more questions than answers. How did the presumed impulses towards immediate self-preservation follow from seminal reason the universal nature? Why then did the early Stoa treat the conventional practices, as family and child rearing, as unnatural? Why suicide was honourable option?

In the early years of writing of his *Republic* Zeno was influenced by the Cynics. The whole Cynic influence made things rather more complicated for Stoicism. On one hand, Zeno supported the Cynic protest against conventional behaviour. In the Cynics' view, beasts were to be an example to men as they lived more primitively and, hence, more naturally than rest of us. On the other hand, Zeno did not quite share the Cynics' denial of rational social life. To him natural law was the sage's right reason in tune with the never failing laws of universal nature. Thus, Zeno's Cynic sympathy was rather misplaced. The Cynics' idea of nature lacked any positive meaning apart from the denial of convention, since they denigrated any study of nature as such. Zeno, as Rist noted, was faced, perhaps unconsciously, with a task to provide 'extra-ethical factors to justify an approach to ethics' (id., 172).¹² In fact, the principal difference between the Cynic and Stoic positions was in the anti-intellectualism of the former, and the conscious intellectualism of the latter. The important feature of the Stoicism, as a whole, was in the contrast of irrational animals and rational man, which was underlined by the concept of sage having right reason. In contrast to irrational animals that nature guided by means of instinct, the sage had his own right reason, as a law in himself, to perceive the universal (seminal) reason of nature as the overall order of things. This seminal reason as grasped by the sage's right reason was Zeno's primary concern. In the Stoic pantheistic world the sage was capable to disengage himself from his own particular fate and to see himself as a tiny part of endlessly reborn nature. So to Zeno 'internal consistency', or the life of virtue, could not be anything else

¹² Nature was the only starting-point for moral philosophy; and the sole reason for studying physics was to distinguish between right and wrong; hence there was no clear distinction between factual and moral

but the sage's living in accord with right (i.e. seminal) reason. Hence, Zeno could not see the end of man in living by the 'starting points' of common (ordinary) human nature. On the contrary, Zeno, like the Cynics, repudiated common human behaviour, but, unlike them, he supported his view by the intellectualistic vision of law of nature as the sage's right reason.

2.2. Zeno's *Republic*: Right Reason against Common Morality

Zeno employed the doctrine of 'special circumstances' to explain the cases of apparent divergence between ordinary and uncommon human behaviour. To Zeno any seemingly unconventional practice could be rational, i.e. natural, in some extreme circumstances (Vander Waerdt, 1994, 301). So cannibalism could be natural if necessitated by the circumstances.

In Zeno's *Republic* many conventional laws, such as those prohibiting incest or cannibalism, were dismissed in the Cynic mode as being against nature.¹³ Since those conventionally prohibited practices could be reasonable in some extreme circumstances, they were a part of nature's seminal reason (*logos*), and in this sense were rational and natural. This argument worked only in the sense of a 'never failing law of nature'. Any marginal practice was, to Zeno, legitimate, or natural, by the mere fact of such (however infrequent) occurrence in nature. Moreover, this marginal 'naturalness' was contrasted with

statements (Long, 1971a, 103) Unsurprisingly, as Long noted, in the pre-Roman Stoa deontological statements were very rare (id.,103). To act accordingly to nature did not mean to act from duty (ibid.).

common ‘convention’. Being endowed with right reason, the sage would follow its dictate in any given situation, his reason being superior to human convention (as merely guess).¹⁴ As a result Zeno held what Vander Waerdt called a ‘dispositional’ natural law. This notion of law was in a marked contrast to the moral law of Socrates (in Xenophon’s dialogue) which never failed, not because nobody failed to follow it but because of the inevitability of punishment.

Some of Zeno’s claims to ‘naturalness’, like the abolition of the private property and money, or establishment of a community of wives, were already prominently featured in Plato’s description of the ideal society too. There was more ‘naturalness’ in Zeno’s city of sages than in Plato’s *Republic* in the sense that work towards an ideal society was done not by force, but through the aspiration towards natural harmony.¹⁵ Zeno did not see a need for courts or military force. So the desirable institutional outcome would arise by itself on the ground of naturalness. Zeno, in almost a ‘New Age’ spirit, fought existing society by dismantling the conventional boundaries between virtue and vice, in contrast to Plato’s authoritarian solution to preserve virtue by subduing dissent. In Zeno’s *Republic* any motive for hostility was to be eliminated: man and women would be dressed in the same clothes (so there would not be offensive competition of sexes), any form of love would be admissible (so there would no ‘hate crime’), children would be brought up in common (so

¹³ A. Erskine provided a vivid description of ideal city of sages in Zeno’s *Politeia (Republic)* (Erskine, 1990, 23-6).

¹⁴ It was a bit like the chess master playing against the super-computer; the ordinary man could not even have a guess.

¹⁵ The abolition of conventional laws by the prohibition of the prohibitions, such as that of cannibalism, would be itself act of ‘conventional’ law, exactly like a prohibition of the early practice was, a point was overlooked by Vander Waerdt (id.,288). The possible solution of Zeno’s Republic paradox of abolition of

all would love everybody's children as their own), there would be no property or money (so there would be no greed), even no temples (so there would be no superstitions).

Zeno's *Republic*, in Schofield's view, had many parallels with Sparta's way of life, with one exception: Sparta, unlike Zeno's Republic, was a militaristic society (Schofield, 1991, 50). The crucial feature borrowed from Sparta's life would be the relative unimportance of family. In Sparta there was not much space for 'the vertical relationships of parent and child, young and old, as well as the importance of marriage' (id., 36). Thus, in Sparta the authority over an adolescent was transferred from the father to the community, and responsibility for his further upbringing was vested with specially appointed officials (id., 38). But was the militarist aspect of Sparta incidental? Was there in the past 2,500 years a more exceptional example of the militarist society than Sparta? This was a society, which oppressed the whole native population as slaves, that, moreover, was without affection of parents and family but with the institutionalised upbringing of children instead.

If Zeno's antagonism to the evolved conventions was a reflection of an aversion to coercion, why then was not he repelled by blatant coercion in Sparta? The lesson that Sparta provided was that it *was* indeed possible to eliminate family life, and support some substitute forms of human relations instead, but that this was not by nature, but by the entire strength of the militarist state. The example of coercive Sparta made even more troublesome Zeno's premise that by right reason the sage would liberate himself from

positive law without a new positive law would be to see it as a hypothetical outcome of evolving society of sages, lived by right reason and unpolluted by the previous harmful conventions.

conventional norms and discard the self-centred impulses, like a natural (or not?) love to one's own children.

To Zeno only fools, by lacking right reason, couldn't be part of the city of sages. Who were those fools? They possibly were some unfortunates who (lacking the sage's right reason) preferred the 'unnatural' conventional family life and their own private property. But, one might ask, could an aversion to bringing up your own children be one of the 'starting points' of nature? Thus, the early Stoic conception of right reason of universal nature led to downplaying of what were commonly perceived as natural inclinations, such as caring for one's own children or property. It was a stand against generally accepted morality.

Zeno's influence upon the later development of natural law was mixed. The later Stoics were at pain to distance themselves from the embarrassing radicalism of their 'founding fathers'. The early Stoic concept of right reason in tune with *logos* led to the concept of the sage who was above any convention. At the same time, the corporeal concept of causality, which assumed no event or body to be the same, led to the Stoic *individualism*. In Zeno's city of the sages all were naturally equal. There was no government or private property. In contrast to the Cynics Zeno's cosmic city was not a vision of the original primitive conditions of nature but an ideal city of sages.¹⁶ It was only later, with the middle eclectic Stoa, with Posidonius, the idea of the lost golden age of innocence of men took roots and became the prototype for the celebrated Roman Law concept of the state of nature.

¹⁶ Chrysippus transformed Zeno's ideal city of sages as neighbours into cosmic city of sages and gods, including all (truly) rational beings, gods and men (Schofield, id., 102). The idea of a cosmic city shared by

3. Between Human Natural Inclinations and Right Reason in Tune with the *Logos* of Universal Nature

3.1. Chrysippus' Natural Inclination to Self-Preservation

Zeno's concern was with the right reason of the sage in tune the pervading *logos* (of universal nature). Zeno's successor Cleantes was concerned only with universal nature (Diogenes Laertius 7.89). In another contrast, Chrysippus (the third head of the school, from 232 B.C.) advanced the novel concept of the natural concern (*oikeiosis*), according to which all animals, including humans, were endowed by nature with an inclination to self-preservation (Striker, 1996, 'Following nature', 225). Chrysippus brought to light a relation between universal nature and particular (human) nature. In such a view the purposeful design of universal nature was reflected in the inner inclination of human nature towards to self-preservation.¹⁷

To Chrysippus, one needed to live in accordance with one's own experience of what happened by nature (id., 249). One should look at the way nature created man (id., 250).¹⁸ It was natural for any living being to have self-awareness; for nature was not to alienate the

gods and men survived among the Stoics well into the imperial Rome, with exemption of Marcus Aurelius, to whom the cosmic city was city of men alone (id., 68, n13).

¹⁷ The assertion of the self-preservation as a natural concern also served to refute Epicurean idea of dominance of pleasure (Diogenes Laertius 7.85-86; Gould, 1970, 170)

¹⁸ It was, in a sense, a shift towards more like Aristotle (*Ethics* 3.5) vision of the end as the excellence of the natural endowment.

animal itself but to appropriate it to itself (D L 7.85). Chrysippus (in Plutarch's account) also stated that from the moment of birth men were well disposed to themselves, to their limbs and to their children (Pembroke, 1971,123). Living in accordance with nature, then, would mean, in Striker's interpretation, to follow a pattern of behaviour common to all animals: trying to preserve and perfect oneself by selecting the things in according to one's own nature, and avoiding things against it (Striker, id., 240). Hence, Chrysippus accepted the naturalness of the inclination to self-preservation, such as the care of one's own children. This presumably would imply the naturalness of 'conventions', such as the family. He also said that as long as the future was uncertain it was better to obtain the things which man was naturally disposed to (Epictetus, Discourses 2.6.9, L&S 58j).¹⁹ Chrysippus' vision of natural inclination already implied the Aristotelian presumption of the natural purposefulness of particular nature, which was out of place in the Stoic corporeal deterministic vision of nature.

Still, Chrysippus also claimed that in the case of man reason served as the 'craftsman' of instinct, revealing what was (naturally) good, or advantageous, and what was bad, or harmful (Gould, 1970, 170; Striker, id., 250).²⁰ Chrysippus shared the earlier Stoics' contrast of the sage's right reason with the faulty reason of fools (as well as with the complete lack of reason in beasts). To Chrysippus there was no place for impulses outside of right reason; unruly impulses were merely faulty reasoning, which should be destroyed

¹⁹ It might explain the difference between sage and the common man: the former would know, while for the latter future would be unknown.

²⁰ With the growth the human animal recognised more and more things in accordance with [human] nature, such as finding out about world and natural inclination for truth, acquisition of technical skills, and the most important recognition of other people as belonging to them (Striker, id.,250).

(Rist, *The Stoic Philosophy*, 183; Gould, 181-4).²¹ Chrysippus took over Zeno's idea of superiority of rational over irrational. He stated that the gods made man for his own and each other's sake, and animals for man's sake (Porphyry, *On Abstinence* 3.20.1,3, L&S, 1987, 54p). Moreover, men did not share justice with animals (Diogenes Laertius 7.129). Chrysippus even famously defined natural law as divine reason, the king over everything, divine and human alike, authority of men destined to live in communities, that determined good (right) and evil (wrong) (Diogenes Laertius 7.88; Arnim, 3, fr.314, Edelstein, 1966, 83). So the law of human society was derived from the *logos* of universal nature. Moreover, Chrysippus said that the foundations of ethics were to be found in cosmology, or theology, rather than in human psychology (Striker, id., 231). As Striker conceded 'the Stoic concept of the end does not arise as a natural continuation of one's concern for self-preservation, but rather as result of one's reflection upon the way nature has arranged human behaviour in the context of an admirable cosmic order [i.e. universal nature]' (id., 230).

There was, however, some precedent for Chrysippus' use of analogy between human and animal behaviour in his doctrine of natural inclination. Zeno, following the Cynics, had also looked to animal nature to justify discarding conventional morality in his city of sages with right reason. Chrysippus himself joined with Zeno, as Plutarch and Sextus Empiricus reported, in defence of incest and cannibalism (L&S, 1987, 67. f, g). In Plutarch's words, Chrysippus inferred from the behaviour of the beast that nothing of this kind was out of place or unnatural (id., 67 f.). However, in his doctrine of 'natural concern' Chrysippus emphasised the common animal practice (such as care for offspring). This rather

²¹ sage would not live by (however natural) impulses (even to self-preservation) if there were against the

Aristotelian emphasis appeared to be a shift away from Zeno's preoccupation with the justification of unconventional practices. Besides, Chrysippus' concern with the common animal inclination to self-preservation was in a marked contrast with Zeno's insistence on the sage's superior right reason. In Chrysippus' case, his appeal to the animal behaviour was part of his agenda to redefine a notion of nature as a sum of natural inclinations of the particular natures. Chrysippus' new vision however had its weakness. If in the animal world the survival of the individual was paramount, should then human society be like that?

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Thus, inherited from the Cynics, the Stoic appeal to animal behaviour resulted in an ambivalent vision of natural law. Chrysippus' doctrine of human natural inclination to self-preservation could be reconciled neither with his own idea of universal reason as the 'king of everything', nor with Zeno's notion of the sage right reason as an autonomous lawgiver.

It was left to the middle Stoa to pursue further the relation of natural human inclinations with the sage's right reason in tune with *logos* of universal nature.

3.2. Panaetius: Natural Inclination to Justice as Right Reason of Universal Nature

overall order of things.

²² Parental affection could hardly provide a tie between self-preservation and the *logos* of universal of nature. There might be no certainty that human co-operation between relatives, friends and citizen and all mankind could be derived from natural parental love to their children (Pembroke, 1971, 123-6). Moreover, 'blind' parental affection would be out of place in the sage's passionless life.

By the middle Stoa the original doctrine of natural law as the sage's right reason had already crumbled to pieces. Panaetius, the head of the Stoa in the second half of the second century BC, shifted even further away from the early Stoic focus on the sage towards a concern with common human nature with its ordinary preoccupations.²⁴

Panaetius defined the end of life as living from the 'starting-points' provided by nature, which were innate inclinations (Striker, id., 253). Living in accordance with the starting-points provided by nature meant to Panaetius simply to follow innate inclinations, each correlated with one of the four cardinal virtues (ibid.). In comparison, to the early Stoics, virtues, such as justice, courage and temperance, were merely different applications of prudence (or right reason) (Plutarch, *On Moral Virtue* 440oe-44id, L&S, 1987, 61 b).²⁵

Panaetius effectively extended Chrysippus' notion of 'natural concern', or *oikeiosis*, by embracing more natural inclinations, which strengthened human being's potential for the social cooperation (Striker, 1996, 'The Role of Oikeiosis in Stoic Ethics', 294). To Panaetius, besides the natural inclinations to self-preservation, there was also a natural inclination to justice, or concern for others. Those two inclinations corresponded to the cardinal virtues prudence and justice. He then renamed 'courage' as 'magnanimity', or

²⁴ To the early Stoics all things not in a strict accordance with the sage's right reason were not virtuous (DL 7.127). The things, like health or wealth, were 'indifferent' as they could be used well and badly (DL 7 102-3). Such things were indifferent as far as they were outside of the sage's control, though they were 'preferable' indifferent things. This was one of vulnerable positions of the early Stoa, attacked by its critics, as Carneades or Plutarch (Kidd, 1971a, 150). But if conventional goods, like well-being or family life, were virtuous things, than surely not only the sage, but even ordinary man could advance in virtue. Panaetius already implied that the natural inclinations directed towards naturally adventurous things (Kidd, 1971a, 152). According to Panaetius among the 'indifferent things', which were between virtue and vice, some things, according to nature, would be preferable to others (as health was preferable to illness), therefore the respective choices would be the steps towards virtue (Cicero, *On Duty* 3. 13.).

manliness, for which he postulated ‘a certain inclination to dominate’, or inclination to independence (Striker, 1996, ‘Following nature’, 253; Rist, SP, 188). ‘Temperance’ became ‘propriety’, supported by natural inclination for order and proportion. It went with ‘beauty, constancy and order in thought and action’ (Striker, id., 253). The last two natural inclinations were meant to strengthen the natural inclination to justice. Essentially, there were two main natural inclinations: to self-preservation and to justice. By postulating the two main inclinations Panaetius planted the seeds of the problem, which were to haunt the future generations: how could the inclination to self-preservation coexist with the inclination to justice?

Panaetius’ new stress on two inclinations of human nature was especially telling in his doctrine of the ‘four persons’ as the four roles in life. Universal nature was *communis persona*, the first natural persona, shared by all men, in a virtue of their reason, and distinguished them from beasts (Cicero, *On Duty*, 107). The second persona reflected one’s individual nature (*propria nature*), as dependent upon individual character (ibid.). The third persona was given by chance, and included wealth or nobility (id., 115). The fourth persona depended from the personal choice as a choice of occupation (id., 115).²⁶ This duality of ‘common’ and ‘individual’ nature in man was another reflection of the duality of inclinations to justice and self-preservation. To Panaetius by means of their reason men saw themselves as a part of humanity and could conduct themselves justly towards others.

²⁵ The focus of the middle Stoa was, as Straaten observed, already on human nature rather than on physical cosmos; on a morality based on the appetites of human nature, rather than on knowledge (Kidd, 1971a, 161).

Panaetius' innovation was in the new emphasis upon the solidarity among all men, not only the sages. The human aims of self-preservation and support for one's family went hand by hand with a concern for humanity at large (Rist, 1969, 193). Man belonged to a number of communities, the largest being the human race, the smallest that of the family (Sandbach, 1975, 124-5).²⁷ A gregariousness of human being beyond merely family ties was obvious since no one would will to live a solitary life (Striker, 1996, 'Following nature', 254). Panaetius also appealed to a uniquely human possession of language showing that men were made for social living (Striker, id., 254).²⁸

Panaetius attempted to strengthen his presumption that the natural human inclination to justice would lead to universal harmony by implying that appropriate acts of the non-sage, lacking in right reason, were guided by external rules, such as moral precepts (Kidd, 1971a, 155-6). Thus, knowingly or not, he opened a way for the interpretation of the original intellectualistic Stoic notion of right reason of universal nature as being manifested (however imperfectly) in the conventional morality.

In summary, Panaetius drew his natural law picture of society from the 'bottom', from the natural inclinations, innate in human beings. Panaetius dealt with the individual nature (*propria nature*) at the first place (Rist, 1969, 186-7). The sage's right reason in tune with

²⁶ Panaetius' insistence of the moral relevance of 'personality' was without precedence in ancient ethics (Long & Sedley, 1987, 428).

²⁷ Panaetius' focus on interconnection of marriage, household and state, where man was born as a son, husband and father, and a citizen was also reflection of new reality – the rise of imperial Rome (Dyck, 1996, 173).

²⁸ In Striker's view, it was a sign of Aristotle influence upon Panaetius, in contrast to the early Stoics, who believed in natural community of all rational beings, including gods as well as humans, and to whom society was not a matter of language (id., n. 22).

logos of universal nature was redefined by Panaetius as the natural human inclination for justice. To Panaetius the seminal reason of universal nature was nothing more than ‘an aggregate sum’ of the innate human inclinations to justice. So the individual natural inclinations to justice would by themselves promote the universal harmony. It was a shift towards more eclectic Aristotelian influenced position. This further undermined the original Stoic intellectualism. Panaetius’ emphasis of the natural inclinations went against the original Stoic assumptions of the superiority of rational over non-rational and reason over impulse. It was no longer natural law as the right reason of the sage. It also amounted to a disengagement from the radicalism of the early Stoa and their contempt for the conventional morality.

3.3. Posidonius’ Right Reason of Universal Nature against Irrational Passions

A pupil of Panaetius, Posidonius (135-51/50 B.C.), was yet another innovator. He had rather a less faith in some sort of ‘invisible hand’ of the free play of innate inclinations of human nature leading to the harmony of universal nature. He was concerned with a cause of evil, which Chrysippus was unable to explain, i.e. how man could do wrong if his only natural inclination was for reason and good (Kidd, 1971b, 206).

To Posidonius apart from the inclination to virtue, or action in accord with right reason, there were also irrational inclinations to pleasure and to power (Striker, 1996, ‘The Role of

Oikeiosis in the Stoic Ethic', 292).²⁹ He rejected Chrysippus' assumptions of the unity of the soul and the passions as merely false judgements. To Posidonius, not irrational inclinations, but only reason, as a better part of the soul, was inclined to moral good.³⁰³¹ Therefore man should rely in his action on reason alone (Striker, 1996, 'Following nature', 260). Moral evil, which in Galen's account arose through the dominance of irrational part of the soul, could not be eliminated, but it could be controlled by reason (Rist, 1969, 213).³² In Posidonius' view, Chrysippus' doctrine of 'natural concern' went against Zeno's and Cleanthes' contrast between reason and impulse (L&S, 63 i).

Posidonius held that human reason itself, being akin to seminal reason which ruled the whole world, was different from animal 'reasoning' (Sandbach, 1975, 136).³³ However, a dualism of the human soul with its innate evil was in an uneasy alliance with the universal harmony of nature. A man, in Rist's words, was already no longer a 'unitary person', but nature was still 'almost a divine person' (Rist, 1969, 217).

Perhaps this dualistic view of human nature led Posidonius to look back to the hypothetical uncorrupted original state of mankind, probably under influence of Hesiod. Posidonius pictured a lost Golden Age to describe the original state of nature. Everybody was free, and

²⁹ In Sandbach's view Posidonius was Aristotelian in his assertion, that man was not sharply cut off the brute animals, since man was not pure reason, but had vegetative and irrational parts (Sandbach, 1975, 130).

³⁰ Natural capacity for anger and desire were irrational and quite distinct from capacity for reason (Kidd, 1971b, 203). Those irrational capacities were animal-like and did not move by reason. Thus Panaetius broke with the early Stoic contrast between rational adult man and irrational animals (id., 205).

³² Though emotional disturbance could not be cured by reason, it should be persuaded to listen to reason, and only the rational could be taught (Kidd, 1971b, 206).

the most righteous man was voluntarily chosen as ruler. Everything was in common, and there was plenty of land for all, hence people peacefully shared things. Under the rule of the wise the weak were defended, there were no fights. (Seneca, *Letters*, 60. 4-5).

For Posidonius the good life was lived in accordance with right reason (but as much as possibly uninfluenced by the irrational part of the soul) (Clement, *Miscellanies* 2.21.129.4-5, L&S, 1987, 63 j). It was to be achieved now by self-improvement, without ever achieving status of sage.

In summary, Posidonius manifested the crisis in Stoic intellectualism, brought about by Chrysippus' idea of natural inclination. The early Stoic intellectualism could accommodate two opposing ideas of superiority of reason and justification of natural inclination. But Posidonius also saw that the early Stoic illusion of the complete rationality of man, and thus, the possibility of the sage, was gone. To the early Stoics human faults were misjudgements of the rational part of soul. By distinguishing the reason and the emotions in the soul Posidonius effectively made the notion of the sage of little practical importance, since the moral conflict was an offshoot of an imperfection of human nature itself. His presumption of the present corruption of man was supported by his vision of the lost golden age of human innocence. It was a shift from Zeno's utopian vision of the sages' city. To Posidonius men were all originally free, but not all were wise. So those men would voluntarily (!) appointed the wise man to rule over them. Were they the Aristotelian natural slaves after all? Posidonius' retreat from early Stoicism was also apparent in his

³³ Striker suggested, that Posidonius' emphasis on order and consistency meant to account for the goodness of

preoccupation with the fight against evil inclination. He claimed that though man's irrational instincts were not ruled by reason, man could be somehow taught to subdue them.

Panaetius and Posidonius' concern with the ordinary human nature opened the way to see the moral conventions as an 'educational' natural law. It was left to the Roman Stoics to take the last step and put the moral improvement of the ordinary man into the centre of their agenda.

4. Cicero and Natural Law

The Roman writers on natural law might be credited with the ultimate acceptance of the conventional moral precepts as an approximation of natural law for non-sages (even though it was left to the Christian Fathers to present the Decalogue as natural law in writing, given by God). It was Cicero, who, consciously or not, defined natural law as a dictate of common reason. To Cicero, natural law, moreover, manifested itself in the archaic Roman morality as embodied by the civil virtues.

4.1. Cicero's Natural Law as Dictate of Common Reason

Cicero (106-43 BC) was an eclectic thinker. He considered himself a follower of the New Academy and Antiochus, who attempted to dilute the scepticism of Pyrrho and

nature's rational order, as well as for the conduct of a wise man (Striker, 260).

Carneades.³⁴ On the question of natural law he was considerably influenced by the middle Stoa.³⁵

The striking feature of Cicero's position was its universalism, at odds with the early Stoic elitist divide between sages and fools. Cicero was in no doubt as to the natural equality of human beings. There was 'no difference in kind between man and man' (*Laws* I. x. 29). The most far reaching consequence of his insight was a shift in the meaning of right reason. In the hands of Cicero it became the universal possession, a sort of self-evident knowledge. We may be tempted to see Cicero's treatment of natural law in the *On the Commonwealth* (*De Re Publica*), as well as in the *On the Laws* (*De Legibus*), as one of those magnificent declarations, which defined the task without resolving it. And, yet, the very definition was a significant break with the original early Stoic concept of right reason possessed only by the sage.

In the *On Commonwealth* 3.33 Cicero produced the definition of natural law, which was to shape natural law theory for generations to come.³⁶

True law is a right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its command, and averts from wrongdoing by its prohibitions.

And it does not lay its commands or prohibitions upon good men in vain, though neither have any

³⁴ H. Rackham, Cicero, *On Ends*, xiii-xxiv) Antiochus maintained that in ethics the teaching of the older Academics and Peripatetics and of the Stoics were substantially the same, with Zeno merely introducing the novel terminology.

³⁵ In his turn, Cicero became one of the important sources on the middle, as well as the early Stoa, since the most of the original works did not survive

³⁶ Although *On Commonwealth* was rediscovered only in the 19th century, this definition was preserved by Lactantius in his *Divine Institutes* 6.8.6-8

affect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or by people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in future, but one eternal and unchangeable law will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment. (tr. by C.W. Keys, Cicero, *De Re Public*)

Now, at last, the idea of natural law received a new breath of life: it was already a law, written in the mind of all men in a virtue of their gift of reason from the author of nature! Law (i.e. natural law) was the highest reason, rooted in nature, and established in the human mind (*Laws* 1.18). In the *On Laws* 2.13 Cicero defined (natural) Law as the distinction between just and unjust in accordance with nature. Human laws were constructed to punish the wicked and to protect the good in accord with natural law.

The plea for natural law in the *On Commonwealth* had been preceded by Carneades' arguments against any law of nature, presented by Philius. From this point of view since the laws differed at different times, there was no such thing as naturally just laws, but the laws were imposed upon man by fear of punishment (3.18). To Carneades men were by nature solitary without any inclination to the society of their fellows. They were driven by the dangers of life to join together for mutual defence. Thus justice (and society) was an offspring of human weakness (3.23). Moreover, to men who acted according their desires, justice became not liberty, but licence (3.23). Men, confronted with choice, between of

doing justice and not suffering (paying for) it, or of doing it and suffering it, or of neither doing it nor suffering it, where the first choice was the best, the last choice was the second best, with the second choice being the worst one (3.23). So society was, then, a result of fear.

To Cicero, by contrast, men were naturally inclined to live with each other (*On Commonwealth*. 1.39-40; *On Duty* 1.7.22). In the first book of the *On Commonwealth* he put Scipio as a proponent of idea that society was built upon human inclination and common agreement to live together. He (1.39) opposed Carneades (3.23) explanation of justice as arising out of weakness. Carneades' argument was based upon Glaucon's positions in Plato's *Republic* (358E-358B) (Schofield, 1999, 'Cicero's Definition of *Res Publica*', 184). Even under prosperity man would not choose isolation (1.39). It was not out of weakness but out of the natural inclination that men gathered in society (1.39). To be permanent any orderly settlement of men needed to be governed by some deliberative body (being either one man, or selection of men, or the people as whole), which owed its existence to the same original agreement as society itself (1.41).³⁷ People (*populus*) gathered in society by a virtue of agreement with respect of justice (*iuris consensus*) and mutual sharing (1.39). Society (*res publica*) thus was understood by Cicero (1.48) as being the thing (*res*) of the people (*populus*) (Schofield, id., 188). To Cicero, the *populus* were supposed to be 'master (*dominus*) of laws (*leges*), the courts, peace, war treaties, the life or death of the individual, money', if only they would maintain 'their own', *ius suum* (ibid.).

³⁷ In *De Officiis Libri* (*On Duty*, henceforth cited as *OD*) Cicero was rather more Aristotelian and less 'natural law' and 'social-contract' minded. From nature there was a common inclination of all living beings to procreation, and so family appeared. From the extended family a state arose. Kinship gave rise to relationship

From the observation that the commonwealth was from the people and thus belonged to them, Schofield then proceeded to argue that to Cicero the people had property rights (*ius*) in the commonwealth (ibid.). However, the notion of ‘rights’ (*ius*) as contrasting with ‘law’ (*lex*) was of a much later origin. The notion of *dominium* as the property of the *dominus* indeed played a crucial role in the medieval development of a notion of *ius* as ‘right’. But the term ‘*dominium*’ (never used by Cicero) was itself of the later Roman Law origin and was distinct from the notion of *ius*. Cicero could hardly see (1.48) *ius suum* as modern property rights. He rather referred to common conceptions of justice (*iuris consensus*), which he mentioned in 1.39, as men’s *own notion* of the just laws, which should be maintained and which was a *subject* of the original contract of society.³⁸

Men were united in society by agreement about a common notion of justice! So in virtue of reason and the gift of speech mankind united in society and shared (!) the sense of justice and law (*On Duty* 1.16.50).

In the *On Laws* Cicero again defended the view that justice was based on nature. The whole human race was bound together in unity (1.32). Since men were given reason by nature, they were also given right reason, and therefore the law too, which was right reason in commands and prohibitions (1.33). Because men all received reason, they all received justice (ibid.). Men could not perceive the difference between good and bad laws by any other standard than nature (1.44). By reason *common to all* (through shared conceptions,

of attachment and benevolence (*OD* 1.17.54). So society was growing organically on the base of family (such as Aristotle saw it) (*OD* 1.17.54).

implanted in minds) men perceived some action as honourable (virtuous) and some as dishonourable (vicious) (1.44). And ‘only a madman’ would conclude that these judgements were ‘matters of opinion, and not fixed by nature’ (1.45). By contrast, mere opinions of the populace were able to produce only a parody of justice (1.43). The variety of contradictory beliefs was due to the corruption of minds, either by upbringing or by an enemy deep within - pleasure (1.47.) It was by an error of thought that men were haunted by pleasure or pain (1.31). The understanding of the right way to live would make people better (1.32). Reason, that lifted man above a beast, was common to all (1.30). So every man, if he found a guide, could attain virtue (ibid.). It was only due to bad habits and false beliefs that men were not alike (1.29).

4.2. Inclination to Justice as Civic Virtue

Cicero’s insistence on a common reason was related to his vision of natural law as embodied in the archaic Roman morality. The idea that the original human laws were rooted in natural law was apparent in his definition of natural law in the *On Laws* 2.13. This vision could also be traced in the preserved fragments of Chapters 4 and 5 of the *On Commonwealth*. As Zetzel pointed out, here Cicero attempted to present the Roman inherited social practice in terms of the Stoic moral theory and the traditional Roman institutes as the natural moral code (*On the Commonwealth and on the Law*, xviii, xvi). Cicero assigned especial significance to the sense of shame (4.4). Men were not frightened

³⁸ In 1.49 defending the principle of equality of men under the law Cicero used ‘*ius autem legis aequalis*’ as if meaning ‘rights are equal under the law’, however it could be also understood as ‘justice enforced by the law is the same for all’.

so much by the threat of penalties as by a sense of shame, or a fear of a deserved censure, that was implanted into man by nature and strengthened by education and social institutions (5.5).

So customary morality was rooted in natural law that was shared by all men. However, Cicero did not abandon the Stoic sage. Cicero's vision of the natural morality as ascribed in the Roman civic virtues led him to redefine the Stoic sage as the statesman.³⁹ To a political figure like Cicero, the Stoic position was flawed in so far as it did not provide a proper place for public duties, which as 'indifferent' things were no part of the sage's virtue. So from a 'right' act of the sage he moved to the 'appropriate' act of the citizen.

To Cicero, as to the Stoics, the existence of self-awareness of even the new born was a proof of the naturalness of self-preservation, as well as self-love (*On Ends* 3.16-7; 5.24-5). In his *Oration for the Defence of Milo* Cicero described the drive to a self-defence as a law, not written, but born with man, which man had 'taken, absorbed and imbibed from nature itself', that if man's life was in danger then every means of securing safety was justified (Wilkin, 1954,23).⁴⁰

³⁹ As Zetzel noted Cicero inserted Aristotelian ideas about the ethical importance of the civil life within the stoic framework of the universal law (Cicero, *On the Commonwealth and On the Laws*, xx).

⁴⁰ Cicero pointed out the contradiction between the Stoic acceptance of self-preservation as a primary drive, and their refusal to account the 'preferred' things as good. To the Stoics the things, like good health and sound senses, which were in accordance with nature, were to be preferred and yet were 'indifferent'. To him the end serving to self-preservation was in the attainment of the largest number of the most important of the things in accordance with nature (*On Ends* 4.27). To Cicero the Stoic view of right reason as the only virtue contradicted their assertion of the natural inclination to self-preservation. The original Stoic position, of course, was not accidental. Their disregard of external things, independent of the choice, was instrumental to the end of living by right reason (in tune with *logos* of universal nature), undisturbed by external events outside of human control. How could self-preservation as the end of life reconcile with the Stoic view of suicide as honourable option? Only if 'self-preservation' could be remade into 'unselfish' preservation of universal nature, which man was merely part of. It was not without sense, since the Stoic nature was living being cyclically reborn and died. Marcus Aurelius gave the example how to live with the thought that in any day you could return to decay of the elements.

In the *On Duty* Cicero emphasised reason as a ‘moderator’ of the natural inclination self-preservation in a case of man contrast to a beast. Only man, possessed of reason, recognised the cause and effect in the chain of events (1.4.11). Man’s reason, as well as his natural inclination to live in society, enabled him to overcome ‘selfish’ self-preservation in the pursuit of the civic duties. By reason people brought together, assisted by speech and common inheritance, and helped the natural love for offspring and desire to provide for family (id., 12).

Still, Cicero, following Panaetius, derived the civic duties from the set of human natural inclinations. He defined *summum bonum* (the ultimate good) as *honestum* (virtue) (1.5-6). *Honestum* consisted of four cardinal virtues: *cognitio* (apprehension of truth); *justitia* and *beneficentia* (justice and benevolence); *maginitudo animi* (noble spirit); *decorum* (modesty and decency) (1.15). Panaetius’ four cardinal virtues dictated the appropriate duties. Cicero the Roman was preoccupied with the civic duties, defining man by his place within the network of family, patronage-client relationships, as well as by public office. Panaetius’ reinterpretation of the ‘indifferent action’ of the early Stoics as preferable actions provided grounds for Cicero to redefine it as the Roman civic duty.⁴¹ To elaborate the notion of duty Cicero used Panaetius’ concept of ‘four personas’, as the four roles of man during his life.⁴² The different stages of life dictated different roles or duties (1.122). Similarly, different

⁴¹ It though might be a matter of uncertainty how much Cicero depended upon Panaetius in promulgating, for instance in Book 3 *On Duty*, ‘ethic of self-abnegation’ in the interest of the commonwealth (Dyck, 24-7). Dyck inclined to think that Pohlenz, influenced by ideology of ‘Führerideal’ of Germany of 1930 – ties, overplayed the importance of Rome audience for Panaetius (id., 24-5).

public standing demanded different duties, as duties of magistrates, citizens or foreign residents (1.124-5).

4.3. Between Self-Advantage and Justice

Cicero, with his preoccupation with the civic duties of the true Roman citizen, fell into the same trap as the early Stoics with their cult of the sage and his right reason. In both cases the ‘natural concern’ of ordinary man was to suffer. In a sense, Cicero’s position was even more contradictory, given his almost Hayekian insight into the traditional morality as proxy for natural law. The dilemma, faced by Cicero, was that the natural inclination to one’s own self-preservation (or self-advantage) ought not to incline man to act against the common advantage (justice). His contribution was to investigate the nature of this conflict between self-advantage, as a manifestation of the inclination to self-preservation, and the moral duty, or justice.

In the third book, *On Duty*, Cicero investigated the possible conflict of self-advantage and duty. Cicero discussed the conflicting views adopted by two past heads of the Stoic school Diogenes of Babylon, who stressed the legal obligations, and his pupil Antipater of Tarsus, concerned with a moral duty.⁴³ J. Annas in the ‘Cicero on Stoic Moral Philosophy and Private property’ drew attention to Cicero’s inconsistency. Cicero appeared to be an

⁴² Firstly, man shared with all mankind a role of a human being, having reason (1.107). Secondly, he had his role as a particular person in accordance with his own particular nature (ib.107, 110). Thirdly, man was assigned to some role by the circumstances (id.,115). Fourthly, man made his own choice of his role (ibid.).

⁴³ It might not be so much matter for the purpose of the present study was a dispute a pure hypothetical reconstruction by Hecato of Rhodes, pupil of Panaetius, who was Cicero’s source, or was it invented by Cicero himself. Schofield agreed with Annas, that in any case it was not probably an account of historical event, he though in comparison with Annas, inclined to see Diogenes, as preoccupied with moral questions as Antipater (Schofield, 1999, ‘Morality and the Law’, 164).

uncompromising advocate of one's moral duty at expense of self-advantage, or even life itself, at odds with his appraisal of naturalness of self-preservation elsewhere.

Should a moral duty overrule a legal obligation? It would be difficult to deny the existence of moral choice between inclinations towards self-advantage and justice. Diogenes, the teacher of Panaetius, was head of the Stoa in mid-second century B.C. Diogenes, as Annas noted, represented the same 'down to earth' approach, which could be traced back to Chrysippus. In Schofield's view, Diogenes was forced to combat Carneades' claim, that a dictate of self-interested reason would be necessary in opposition to justice (Schofield, 167-9).

One dispute concerned a famine in Rhodes, where some merchants had imported grain, and, knowing that another large delivery of grain would arrive soon, were faced with the moral choice of informing the buyers about the forthcoming cargo, or keeping quiet and selling at higher prices (3.50). Diogenes' view was that there was no duty to tell to another party whatever would be advantageous to that party (3.52). He also argued that if, instead of selling, people would give everything away no property would be possible (3.53). Cicero shared Antipater's outrage of such a view as inconsistent with natural human fellowship (3.50, 53).

Another dispute of Diogenes and Antipater concerned the sale of a defective house without revealing its faults to the buyer (3.55). Antipater (and Cicero) objected to Diogenes' opinion that man was morally bound to not conceal only that which he would be

obliged to disclose by the [civil] law.⁴⁴ Dyck argued that Cicero's practical interest, as a lawyer, was in finding comprehensive legal remedies against fraud and deception, based on principle of 'equity', by means of the Praetors' edicts (Dyck, 569). By an excursion into the history of the contractual rights in Rome (3.58-70) Cicero demonstrated how the general trend in the Praetors' edicts (which later were considered the 'law of nations', *ius gentium*) was towards more protection of the parties in the informal contracts. Without doubt if the seller withheld information the buyer would be disadvantaged, and Cicero's point was about need for a legal remedy (3.67). Cicero's concern was even more general: that one should not use his dominant bargain position for unfair advantage (as in a bargain with an underage person) (3.61). Cicero claimed was that any sham and perfidy were against natural law (3.68-70). Diogenes would agree but define a sham in the legal terms. The vision of justice, which would not demand a self-abnegation, would be about the set of the rules in dealing with each others, to protect the contract and the private property. In fact Cicero moved towards it in his search for the legal remedies. It was not about renunciation of the one party's interest but about protection of the legitimate interests of all parties in question. 'Fair dealing', or principle of 'equity', would advance long-term interests of all members of society.

Yet again in 3.90 of the *On Duty*, in a case in which there no legal obligations involved, Cicero defended a complete self-abnegation in the circumstances of shipwreck with two sages. They were to decide who of the two, as being more valuable for the society, should survive. If altruism should always carry a day even at price of self-preservation, was any

⁴⁴ In Dyck's view Cicero's objection was of the professional kind: to the [unwarranted] use of the existing civil

self-interested activity to be disallowed? Panaetius' pupil Hecato, whom Cicero opposed (3.63), argued that means and resources of men were, in a sense, the riches of the state. So it would be beneficial for society if men looked after their own family (and property). Hecato's view seemed to be more consistent than Cicero's (Annas, 171).

Dyck conceded that in the *On Duty* Cicero's position in the third book contradicted his defence of private property in 2.72-85 (Dyck, 1996, 572). His presumption of man's self-abnegation undermined the whole imperative for private property, or the riches of man, as a manifestation of man's strive to self-advantage. Still, in 2.72, Cicero clearly stated the defence private property as a task of government, since a civil society and state had originated with a purpose of protection of the private property. Moreover, in 2.78 he claimed that expropriation of the private property violated concord and fairness in society. So being established, private property became an integral part of the law of human fellowship (1. 21). In the *On Ends* 3.67. after conceding that private property was not by nature, but by occupation, Cicero evoked Chrysippus' analogy with a theatre as a communal place, where, once the place was occupied by somebody, it became his, in order to justify a 'status quo' of private possession.

In summary, in his natural law vision Cicero was dependent upon Panaetius' idea of natural inclination as 'starting points' for virtues. Natural inclination to justice thus led to the virtue of justice, which defined the moral duty. But could the natural inclination to justice override the prime natural inclination to self-preservation? Cicero presupposed the

law as a complete guide to morality (Dyck, 561).

abnegation of the inclination to self-preservation for the sake of the inclination for justice. His contradictory attacks on self-interest were rooted in his Roman preoccupation with the civic duties. Cicero's sage was the wise man of civic duty. The consequent shift from the appropriate action for the non-sage to the right action of the sage might explain the inconsistency in Cicero's attitude to self-advantage as a supposed natural inclination. Still, Cicero did not advocate communism, or a society where people had no control over their choices. Cicero, the defender of the civic duties, was sometimes at odds with Cicero, the defender of common sense. However, he also put forward the approach to justice as exemplified by the principle of 'equity'. This legalistic idea of equity had less to do with the presumed individual natural inclinations to justice than with the abstract concept of justice, shared by men as universal right reason.

4.4. Summary of Cicero

In respect of the 'practical' concepts of natural law, Cicero drew a distinction between the law of nations (*ius gentium*), guided by the legal principle of equity, and civil law. He implied the evolution of civil law towards natural law, through the embrace of the principle of equity. He did not, though, discriminate between the law of nature, as a law of the original state of nature (*ius naturale*), and the law of nations, as related to civilised human condition (Carlyle, vol. 1, 18). Cicero did not address the question of whether all free people were in the state of nature. He noted that private property was not part of the original condition of mankind, but arose from ancient occupation or by war, or by

agreement. Still, the purpose of the commonwealth was to protect it for the sake of human fellowship.

Cicero's main contribution to the idea of natural law was in his vision of it as a dictate of reason common to all men, which was true everywhere, now and in the future. Thus, his long-lasting innovation was in defining natural law as inner knowledge, shared by all mankind by virtue of common reason. Paradoxically, Cicero did not see a contradiction between this intellectualistic definition of natural law and his adoption of anti-intellectualistic Panaetius' doctrine of natural inclinations. Cicero followed Panaetius' path and substituted the early Stoic right reason of universal nature by 'natural concern' for others, or for justice as supported by inclinations for independence and order. Inclination for justice was manifested for Cicero in Roman civic duty. He also had an intuition of natural law as embodied in the customary morality. His concern with the civic duty led him to outline the conflict of two natural human concerns: self-preservation and justice, his yet another everlasting contribution. Here he put forward a new idea of justice, aside of the vision of justice as the natural inclination, as abstract principle of equity. Still, in spite of his definition of natural law as common knowledge, Cicero saw it in the civic sage's virtues rather than in common moral precepts.

5. Seneca and Christian Spirit

Seneca (4 B.C.-65 A.D.) put Cicero's declaration on natural law into the 'flesh and blood' of humanistic, moral counsel. Seneca did not have Cicero's illusions about life as fulfilled

by the civic duties.⁴⁵ To him, conventional moral precepts rather than civic virtues, served as the non-sages make-do for the sage's right reason. In comparison with the detachment of Cicero, Seneca was more personal in his writing. Seneca's appeal to a heart helped him to look, if not more humble, at least more human, and more Christian.⁴⁶

Seneca did not quite follow the Panaetius-Cicero vision of a natural inclination to justice as a substitute for the sage's right reason. Rather, he reinstated the primacy of reason in man, in which man preceded the animals and followed the gods (*Ad Lucilium Epistulae Morales (Letters)* 76.9).⁴⁷ True perfection, lacking in animals, lay in accordance with the seminal reason of universal nature (124. 13-4). To Seneca, natural law was perceived by common reason, but it was matter of moral self-improvement rather than of the civic duties.

5.1. Natural Law as Moral Precepts

Seneca's most important contribution to natural law was in his discussion of the Stoic position in respect of moral precepts. Were general precepts out of place since every situation demanded its own particular advice? Seneca appeared to consent to such view on

⁴⁵ Seneca, a courtier of Nero, was vulnerable to the accusation that by accumulating a huge fortune and being too close to the doubtful Imperial Court, he was not living up to his words. But as Griffin put it 'for his disciples contemporary and later, Seneca's power as a healer of souls has more than made up for his shortcomings as a model of virtue. The literally portrait of himself as a moral teacher that Seneca has left in his essays and letters is rightly judged more precious legacy than the historical [image of his own life]' (Griffin, 1974, 34). Seneca himself insisted, that he did not preach to his friend as a man who already overcome his own sins, but as too a patient, discussing the available remedies (*Letters*, 27. 1). And as it was common with the Stoics (and as Cicero before him), he ended his life with dignity in this uttermost test up to his words.

⁴⁶ As the Apostle Paul was in Rome during Seneca's life-time of the first century AD, it is hardly surprising that forged letters between Seneca and St Paul were circulated (probably dated from the fourth century) (R.M.Gummere, 1963, 67-8).

⁴⁷ The references in the text are to the *Letters*, if it is not specified otherwise.

a number of occasions (22.2; 71.1; Inwood, 1999,104-5). This view may have been rooted in early Stoicism, with its belief that through his right reason the sage was able to comprehend the every event with all its particulars. However, Seneca also asserted the need for general precepts for ordinary men, especially in the *Letters* 94 and 95.⁴⁸ Some uncertainty of Seneca's position partly arose out of his confusing and interdependent usage of moral instruction (*praecepta*) and moral rules (*decreta*). In one sense, to him, general rules of philosophy (*decreta*) differed from the moral instruction (*praecepta*) as general and particular precepts, or rules (94.31). However, the early Stoic vision of right reason was not about general against particular rules.⁴⁹ The early Stoics, such as Zeno, doubted the applicability of the concept of 'rule' as such in the world where any two events were never the same. Seneca put forward his own interpretation of the Stoic *decreta*. The Stoic general rules, or principles, were the things, which in strengthening man's 'spirit', left him calm and tranquil (95.12). Seneca illustrated his thought by the example of a man without standard (*regula*) in himself (95.39). As such a standard he possibly had in mind Chrysippus' 'law' (Inwood, 117). But this Stoic 'law' was nothing less than right reason. Hence, morality was grounded in the things, which strengthened right reason, such as the four Stoic cardinal virtues. So a ground for morality was the teaching of the Stoic virtues, such as not to be disturbed by the external events.⁵⁰

Nevertheless, Seneca did advance a new view of natural law. He saw common moral precepts as 'proxy' to right reason for a man who was not yet the sage. His argument was

⁴⁸ Seneca's position on moral precepts has been highlighted by Kidd (1978, 247-58).

⁴⁹ If only 'rules' were not to be understood in unspecific (!) sense of a rule of thumb. Such interpretation of Stoic notion of natural law, advanced by Schauer, was supported by Inwood (ibid., 107-8).

twofold. On one hand, Seneca advanced Cicero's vision of natural law as common knowledge, claiming that some moral precepts were evident to everybody, such as you should treat others as you would like others to treat yourself. On another hand, he argued that man, who was not yet sage, achieved moral improvement by following to the moral teaching.

The precepts expressing the truth itself would be instantly evident even for the most ignorant, (for example: you should treat others as you would like others to treat yourself (94.43)). Had not man been implanted with an aversion to things against nature? (97.16)⁵¹ Transgressors would not escape the fear as punishment by nature (97.16.). The right way of life was one but immoral ways were numberless (122.17).

There were two reasons for man's failure to live rightly: either the soul was already corrupted by wrong opinions, or it was inclined to wrong opinions (94.13). As long as man was still a not-sage, he needed precepts defining what to do, and what to avoid, in order not to wander without a guide (94.50-1). Repetition was like reassurance to the soul unable to see even the obvious thing (94.25). The soul, in contrast to the senses, needed advice to know how to live (94.19). Thus, Seneca moved away from the early Stoic contempt for the fool. To him, a man, who, in his efforts to obtain truth, was needed not merely the example to follow but the instructor as well deserved the respect the most (52.3-4).⁵²

⁵⁰ This point was missed by Inwood (id., 116-7).

⁵¹ In such remarks of Seneca, like the last, one could almost see natural law as 'written in the heart'.

⁵² In a sense the wise man stood above god. The latter was free of fear by nature, but man was freed by his own efforts (*Letters* 53.11).

Seneca doubted that merely knowledge of good and evil was sufficient to secure virtue. To Seneca, to overcome the existing perversion of the morals admonition, encouragement and consolation were needed, aside of the general rules (95.34). The main reason for the 'disease' (of perversity) was in contempt for common way of life (122.18). Vice lay in immoderation, in an excess of pleasures, in perversity against nature (122.5-9). The only worthwhile power was a power to get rid of one's own vices (94.60). Those conquerors, such as Alexander, who seemed to be pursuing their enemies, were themselves being pursued to their own self-destruction by mad passions of greed, ambition and cruelty (94.61-2).

Seneca, following Posidonius, claimed that the irrational lower part of soul could enslave the mind (92. 8-9). The morally corrupt soul would not know shame (97.12). So not only mind, but the conscience too, needed to judge of man's acts, and thus a sinner was punished by guilty conscience (97.10-6). Man needed to raise his free spirit above the frail body (65.16, 21-2). Seneca, thus, brought the germ of the notion of free will to the Stoicism (Usherov, 415).

Seneca's stress on the priority of an inner freedom to obtain virtue reinforced his claim of the natural equality of man. The noble man was one who had a natural inclination to virtue (*Letters* 44.5). Men all came from the same ancestor, all walked under the same sky, all breathed, lived and died. By misfortune anyone could become a slave. One could be a slave, but free in his soul; there was no slavery worse than voluntary slavery of a sinner (47.10, 17).

5.2. Seneca's Sage

Even the sage's image had been softened in Seneca's hands. With reference to Chrysippus, Seneca defined the sage as a person without any needs (*Letters* 9.14). Seneca attempted to explain how this could be possible. Even in a moment of calamity the sage would be composed, retreating into himself to remain himself (9.16). In the meantime, though, he would marry even without need, produce children and have friends, as a human being having a natural attraction to many things (9.17). The wise man of Seneca differed from the sage of Zeno in his rather conventional inclinations to family life. It was already a wise man with a 'human face'. Still, his deep-seated Stoic pantheism did not let Seneca abandon the original Stoic notion of sage. Just as the divine order could neither be helped nor injured, there was nothing which the wise man would care to receive (*Ad Serenium*, 'Nec injuriam,' &c.viii : in Carlyle, vol. 1,26). Seneca, as Marcus Aurelius after him, was helped by the thought that apparent decay was, in its essence, an eternal rotation, like the change of seasons (*Letters*, 36.11). By the right reason the sage would preserve his inner self from the impact of the external turbulence, i.e. to be free from misfortune (56. 12-14). The ultimate good was still in right reason, in the soul with of the aspiration to truth (66.6). Virtue was right reason (66.32). Pain and suffering were indifferent for virtue (66.20).⁵³

⁵³ Reason, however, was in imitation of nature (66, 39). Seneca though followed the middle Stoics in considering the certain natural things as goods. Firstly, there were unconditional goods such things as peace, prosperity, joy; secondly, goods in the misfortune, such as endurance, and, thirdly, goods, such as good posture or face expression (66.5). While the circumstances of the unconditional goods were in accordance with nature, the circumstances of the other kinds goods were against nature (like suffering), though the goods themselves were in accord with nature (id., 36-9).

5.3. Golden Age as State of Nature

In apparent contradiction of his attachment to the notion of the sage Seneca saw the current condition of human nature in rather gloomy light. Possibly out of a nostalgia for the old Roman way of life, Seneca lamented the lost golden age described by Posidonius (*Letters* 90.4-5). This state of nature was to him a state of innocence where all were originally free, and there was no private property. The original human conditions were sufficient for necessary human need (90.18). Seneca, though, diverged from Posidonius on the question about the fruits of civilisation (90.24-30). To Posidonius, it was the work of philosophers. To Seneca, the fruits of civilization had contributed to the corruption of the simple natural life. Thus, the sages would not trouble themselves with those worldly matters. The ordinary people were inventors of all marvels of convenience.

However, human striving for convenience led to a disintegration of the original conditions. A desire for unnecessary things had arisen followed by desire for perverse things (90.19). Bit by bit vices crept in, the kings became tyrants, and a need arose for the law (90.6). Did men become corrupt by civilization? Seneca was of two minds. Seneca highly praised the lost simple natural life (90. 36-45). However, in the state of nature people were innocent but ignorant (90.46). The underdeveloped human mind could not fulfil the purpose of human life to obtain virtue. Nature did not give virtue to man without the purpose. The soul needed to educate and train itself to reach virtue. Seneca was without illusions about the corrupt nature of man. Since virtue was a right reason, it would be against Stoic ideal of the wise man to try to find virtue in a state of ignorance. As Seneca said in his last letter to

Lucilius, the animal or a newborn child could not have true virtue since they did not possess reason (id, 124. 7). From Seneca's reasoning on the original conditions and after it appeared that sin and virtue had arisen together. He also implied that justice emerged as remedy for sins (90.6).

To Seneca, like to Posidonius, in the state of nature all things were in common, hence there was no greed. Lacking Panaetius and Cicero's concern with natural inclination to self-preservation he had a little to say about self-interest or private property. Seneca preferred to stress the burdens of wealth, or danger of wealth for corruption of the soul (87.31). Still, he remarked that the evil was not the wealth itself being merely a tool of one's own silliness, or meanness (87. 30).

5.4. Summary of Seneca

Seneca was a rather unconscious moderniser. He stood at the parting of the ways. He was attached to the Stoic vision of the sage, who would strengthen his right reason by excising the Stoic virtues. Still, he explored the vision of natural law through common moral precepts evident to all, such as, that one should to treat others as he himself wished to be treated by others. He *de facto* adopted Cicero's vision of natural law as common reason. His novelty was in his insistence on the teaching of common moral precepts in the face of the prevalence of vices.

Seneca saw the state of nature as the original primitive condition of innocence. Seneca was aware of the tension between the original Stoic idea of the sage as rising above the disturbance of everyday life, and Roman ideal of the civic duty. So his original state of nature lay in the primeval conditions of mankind. He went beyond Cicero's vision of archaic Roman society as manifestation of natural law. He was not, however, a Cynic. He had the insight that the original conditions of innocence were devoid of virtue as well as vice. Still, in spite of his insight into prevailed corrupt human conditions, Seneca had attachment to the notion of sage. As if, he had hoped, against hope, that man could become one some day yet.

Seneca plucked a note that harmonised with the entrance of Christianity. From Seneca's appeal against the transgression of the common morality, there was a natural succession to Paul's law of nature, 'written in the hearts' of all men. He appealed, if not to humility, then to moderation. His idea of the voluntary slavery of the sinner became a commonplace in the early Christian thought. He also was dear to the Christians in his emphasis on the free human spirit rising above the corrupt body. His idea of an original state of nature without a division of property, or slavery, was also taking over by the early Christian Fathers.

6. Summary of Stoicism

The first vision of natural law as the right reason of a universal nature was as intellectualistic as it could be. The Stoic vision of natural law as right reason, underlined by the contrast of the rational man and the animal, made the lasting impression upon the

subsequent natural law tradition. The Stoic intellectualism, however, was proved to be less satisfactory in its concept of right reason as belonging only to the sage.

To live by right reason was to Zeno 'to live in accordance with nature', meaning the seminal reason of universal nature. However, this concept received a new meaning of living in accordance with the natural self-preservation in the hands of Chrysippus. The particular outcome of the early Stoa thought was a tension between the notion of right reason of universal nature and natural the inclination to self-preservation. Panaetius' innovation to see 'reason' of universal nature in 'natural' human inclination for justice only made this conflict apparent.⁵⁴ In fact, a presumption of naturalness of inclination to self-preservation had a potential to undermine the intellectualistic integrity of the Stoic thought. Posidonius was the first, who realized the danger of the two contradicting premises. Yet another Stoic bequest, through the hands of Cicero, was to outline the conflict between 'natural concerns' for justice and self-preservation.⁵⁵

Zeno's sage with his grasp of right reason of the universal nature did not need to consult conventional moral precepts. But Chrysippus' idea of 'natural human concern' represented a shift towards more 'down to earth' approach to conventional morality. By the time of the Roman Stoa this shift became embodied in Cicero's ingenious vision of natural law as common knowledge, shared by all men in a virtue of their possession of reason, and embodied in the customary morality. This stand was strengthened by Seneca's emphasis on

⁵⁴ This conflict will reappear not only in Cicero, but also in Ambrose, Augustine, Anselm and Scotus and Grotius.

common human potential for natural law and on the importance of precepts for moral life. Such a shift in focus towards ordinary man was a break with the idea of natural law of Zeno's Republic.

The Stoic intellectualistic impression upon the later generations was never completely dissolved. It was primary through Cicero's idea of natural law as a dictate of common reason. Cicero's vision was, in a sense, a return to the archaic notion of divine and unwritten law, reflected in common morality. This vision provided a 'bridge' to the Old Testament concept of law as God's dictate. Cicero's reinterpretation of natural law as a dictate of common reason, as well as Seneca's proxy the conventional moral teachings for natural law, inspired the early Christian Fathers to the vision of the revealed Old Testament Commandments as the written natural law given aftermath of original sin.

The other (derived from the eclectic middle Stoics) contribution of the later Roman Stoa was in the concept of the original state of nature, where all men were free and equal, contrasted with the civilised conditions of private property and servitude. The early Stoic non-primitive conception of natural law as right reason of the sages (not savages) was in conflict with the middle Stoic notion of an original Golden Age. The confusion was brought into the Stoic thought by Posidonius, who adapted archaic Hesiodic idea of the Golden age, with Seneca passing it into posteriority. Seneca, however, was not without insight into contradiction the Hesiodic vision with the early Stoicism, and distinguished a state of innocent ignorance from a state of virtue and reason. This Seneca's vision of

⁵⁵ The only feasible solution, impossible inside of the Stoic pantheistic and mechanic conception of reason,

division between natural and civilised states was fitted in almost perfectly with the coming Christian concepts of the state of Innocence and original sin.⁵⁶

was an adoption of the Aristotelian notion of nature (as was later done by Thomas Aquinas).

⁵⁶ The Stoic idea of state of nature was also tested out by Roman Lawyers (see Appendix 1). Gaius attached himself to the early Stoic non-primitive concept of natural law as a law of distinctly human reason. He did not differentiate between the original primitive state of nature and the civilised state. Ulpian introduced the fateful distinction between the law of nature and the law of nations. To him only the primitive natural inclination to self-preservation corresponded to the original law of nature. The early Stoics' New Age 'communism', as well as the middle Stoa eclectic notion of the Golden Age, led to the Roman Law assumption of private property and servitude not being part of the original law of nature. The Stoics did not share Aristotle's concept of natural slaves. Posidonius, though, accepted the voluntary rule of the wise. Already by Seneca there was the only one true slavery: the voluntary slavery of vice. Private property, too, was not by nature. But to Chrysippus and the middle Stoics once it was established it was here to stay, like the family.

Chapter 3

Biblical Ideas of Law

Introduction

The overarching thesis of the present study is that natural law in its maturity lay in the intersection of the Stoic's intellectualistic conception of natural law as right reason, and the Judeo-Christian voluntaristic conception of law as God's will.

Having dealt in Chapter 2 with the Stoic *intellectualistic* vision of natural law as the sage's right reason (in tune with the *logos* of universal nature), and constituting a kind of an internal 'lawgiver', the present chapter introduces the rival *voluntaristic* idea of law as God's will rooted in the Old and New Testaments.

The Old Testament's *voluntarism* and 'creationism', with its vision of God as Creator and the Lawgiver, were in a sharp contrast with Stoic pantheism and intellectualism, with its vision of nature as a body animated by *logos*. The Old Testament Law was God's will revealed, while Stoic natural law was human right reason. The particularity of the Old Testament *voluntarism* was its *legalism* as a vision of God's will through the Commandments of God, who was to judge man by his deeds.

The New Testament brought a new vision of voluntarism, with an emphasis on inward (not outward) righteousness, manifested in Christ's internal commandment of love and

forgiveness. This vision was radicalized by Paul's *anti-legalism*, who discarded the Old Testament idea of righteousness through the deeds under the Law. To Paul the Old Testament Law was a law of bondage of the spirit and flesh, in contrast to the new Christ's 'law' of freedom through salvation by God's grace.

The particular contribution of this chapter is to underline the significance of the voluntaristic idea of law as God's will for the Christian vision of natural law. In the more specific terms this chapter focuses on the analysis, firstly, on the Old Testament voluntaristic idea of law in comparison with the Stoic intellectualistic natural law concept, and, secondly, of the Old Testament legalistic voluntarism and the New Testament Pauline anti-legalistic voluntarism in its relevance for the idea of natural Law.

The first section will provide an account of the Old Testament legalistic-voluntaristic concept of law as God's Commandments, which was given to man made in the *image* of God.

The second section will outline the two New Testament means of dealing with Old Testament legalistic voluntarism: Matthew's reconciliatory and Paul's rejectionist postures toward the Old Testament legalism.

1. Legalistic Voluntarism of the Old Testament

The focus of this section will be the Old Testament voluntaristic conception of law as God's will revealed by His Commandments. It will be argued that the Old Testament did not have, and could not have had, the Stoic-like idea of law as right reason.

In contrast to the Stoics' pantheism, the Old Testament's God was not seen as contained in nature.¹ The Biblical God was not merely a seminal reason (*logos*) of nature. The Old Testament's God was a Creator, and, nature and man were His Creation. In contrast to Stoicism, the Biblical man as part of Creation had a beginning and thus should have a destiny, or an end. It was a relation of man to God, the Creator, which gave the whole meaning to human life. If to the Stoic the key to human life was in following right reason, to the Jew of the Old Testament the key to human life was in obeying God's will. Following right reason, the Stoic sages, shared in divine *logos* of nature. Obeying the Commandments, the wise men of the Old Testament shared in God's will.

Still, the Old Testament had in common with Stoicism a vision of corporeal nature of man as a 'living soul' (in contrast to the Neoplatonic vision of duality of body and spirit). In Stoicism man's body was animated by the 'breath' of his rational soul. In virtue of his rational soul man was partaking in the *logos*, a divine force of pantheistic nature, so in his reason man was like a god. In the Old Testament man was made into a living soul by God's breath. Man was created in the *image* of God and after God's *likeness*. The Old

¹ In a way the Old Testament shared with Stoicism a wider vision of law-governed man and his deeds. But while for the Stoics a law was in 'internal' Right reason, for the Old Testament it was in God's 'external' precepts.

Testament and Stoicism shared this vision of man, being in the image of God, and, hence, superior to the rest of creation. Still, in contrast to Stoicism, the Old Testament God's image (or likeness) could not explicitly denote man's rationality or man's capability of knowledge of nature by his own reason. The Old Testament, instead, subscribed to the *voluntaristic* idea of law as God's will, which would direct man in his works through the revealed Commandments.

1.1. Man made in the *Image* and after the *Likeness* of God

The distinctive Old Testament usage - man 'made in the *image* and after the *likeness* of God' - occurs in *Genesis* 1.26-7, 5.1-3. Although 'image' and 'likeness' apparently were used as synonyms, the Judaic 'likeness' was in Rust's analysis more abstract than the more concrete 'image' (Rust, 1953, 116-7). In contrast to God's image, given to man in his formation, the likeness was an endowment, which fitted man 'for kinship with God and therefore with a capacity to respond to his Word' (id., 121). In *Genesis* 2.7's account of man's creation, God passed by his *spirit*, as by wind, a *breath-soul* into man's face and man became a *living soul*.² Here two other related notions of 'spirit' and 'soul' appear (ibid.). It might be possible to trace a relationship of 'image' to 'soul', and 'likeness' to 'spirit'. According to the archaic Judaic notion of the unity of body and soul, the locus of the soul was in the blood, but gradually the soul became understood as the life principle in man, in contrast to the spirit as man's organ of relation to God (Nierbuhr, 1941, 1,162).

Man had become a breath-soul in the image of God. The Old Testament God's notion of breath-soul resembled the Stoic one. The 'bodily' vision of soul was common to the Old

² In King James' version: 'God formed man of the dust of the ground and breathed into his nostrils the breath of life and man became a living soul'.

Testament as well as to Stoicism. In Stoicism, though, the ‘breath’ (*pneuma*), as rational breath-soul, was inseparable from Spirit, as seminal reason (*logos*) pervading the whole nature. But in the Old Testament the Spirit of God could not have the intellectualistic meaning of His Reason but rather would denote His will. It was beyond the thought of the Jews of Old Testament to conceive a law of nature in the Stoic sense of a law of human reason. As Rust pointed out, ‘the Old Testament men never used the argument from design as a proof of the divine existence nor did they believe that man could plumb the depths of the divine wisdom’ (Rust, 1953, 144).³ The beginning of wisdom was in fear of God [*Prov.1.7*]. To have a good understanding was to obey His Commandments [*Ps.110.10*]. Knowledge and understanding came out of His mouth [*Prov.2.6*]. Thus, there was no human understanding in the Old Testament apart of the adherence to God's will.

1.2. God’s Covenants to bring man to live by God’s will

Due to the voluntaristic understanding of law as God’s will (in contrast to Stoicism) the Old Testament had a notion of sin as disobedience to God’s will, a trespass against God’s will, such as the repeating original disobedience and Fall of Adam and Eve. Sin arose from pride of man, who forgot his dependence upon God, such as the pride of Babylon condemned by *Isaiah* 47.10. Though the roots of obedience and disobedience to God were inward, it was the outward deed which was judged. So the Old Testament voluntarism could be described as *legalistic voluntarism*. It was by (legal) means of Covenant with God that men shared in God’s will.

³ The idea of wisdom as related to the ordering of nature and creation was of post exile origin (Rust,

In the very beginning of creation God laid the original Law for mankind to fill the earth and subdue it [*Genesis* 1.28]. In a virtue of man made in His own image, God gave man the *dominium* over the other creatures (ibid.).⁴

As a result, of Adam and Eve's Fall God laid a curse upon the first man [3.19]. After the Flood, God entered in a Covenant with Noah [9.1-12]. God prohibited the shedding of human blood [9.4-6]. Instead man was again commanded to be fertile, and multiply [9.3].

Men's later disobedience led God to make a different kind of Covenant, now not with all mankind, but with the chosen people. God entered into a Covenant with Abraham and his descendants [*Gen.*17.2-10]. Abraham was promised that he would be the father of a new nation chosen by God. Abraham received the commandment of circumcision [*Gen.*17.10-4] as a sign of this Covenant. But his descendants were not always faithful to the Covenant. Still, when the Jews were cried for God's help, while being captives in Egypt, God led Moses to rescue them. During the Exodus Moses had a vision of God at Mount Sinai [*Exodus* 20.3-17]. God gave him the Ten Commandments:

'Thou shalt have no other gods before me' [20.3];

'Thou shalt not make unto thee any graven image...' [20.4];

'Thou shalt not take the name of the Lord thy God in vain' [20.7];

'Remember the Sabbath day to keep it holy' [20.8];

'Honor thy father and the mother...' [20.12];

1953, 139-40).

⁴ Although the notion of *dominium* as a gift of God to man was of Old Testament origin, the Stoics, too, held that the other creatures were made for the sake of man. This Old Testament notion of man having *dominium* as *natural* endowment due to him as being in the image of God had a lasting significance for the later idea of natural right.

‘Thou shalt not kill’ [20.13];

‘Thou shalt not commit adultery’ [20.14];

‘Thou shalt not steal’ [20.15];

‘Thou shalt not bear false witness against thy neighbor’ [20.16];

‘Thou shalt not covet thy neighbor house, thou shalt not covet a neighbor’s wife...’ [20.17].

God also commanded the love of one’s neighbour, and prohibited the doing of harm to others and continued anger against a brother [*Lev.19.13, 7-18*]. The Commandment to believe in God was supplemented by the commandment to love your God by all strength of your heart [*Deuteronomy 6.5*]. God supplemented the Decalogue by the ritual laws [*Leviticus 11-5*].

Prophecy of God’s new Covenant appeared in the aftermath of the Babylonian exile in *Jeremiah 31.33-4*. By this Covenant all the chosen people would know God and His law in their hearts, and treat each other as brothers and neighbors. It implied the complete obedience to the will of God. Here the fateful idea of the law ‘written in the heart’ had found its first embodiment. As Rowley pointed out, in *Jeremiah* there was an appeal of universality though still confined to Israel (Rowley, 1956, 192-3). This idea of the law universally written in the heart reappeared in *Ezekiel 36.26-7* (id., 193). God took out ‘the stony heart’ and put His own spirit within man enabling him to live according to God’s will.

1.3. Salvation and Grace

Thus, the Old Testament contained the seeds of the future Christian universalism. Through the gift of God’s spirit, all men would have the law of God’s will written in their

hearts. Even, the Old Testament 'exclusive' idea of the chosen people itself reflected the universal significance of their faith in God (Rowley, 1956, 183). In the post-exile times, in *Isaiah* 42.6, the people of God were called to proclaim God's law to all, to be a light to the Gentiles (id., 185). In contrast to Stoicism, then the Old Testament universalism was achieved not through reason, but through the universal gift of God's spirit, which led to life according to God's will. In fact, this universalism was not, as in Stoicism, an original and lasting condition, but a condition, which had been lost, but was to be regained through the coming salvation.

The idea of salvation as conceived in historical terms grew out the Judaic concept of God as present in history. It had its roots in the Old Testament eschatology, which appeared in the aftermath of Babylonian exile (c. 165 B.C). In *Daniel* 11.27-45 the expectation of a future kingdom of salvation appeared in defiance of the present kingdom of evil. In 7.13-4 the hope of the coming universal salvation as a new everlasting kingdom of all nations and languages was announced. In 12.2 the expectation of man's resurrection was revealed, when 'many of them that sleep in the dust shall awake, some to everlasting life, some to shame and everlasting contempt'. But it was not the resurrection of an 'immortal' soul, but everlasting natural life of the righteous. The ultimate hope was of resurrection of all mankind [*Isaiah* 25. 6-8.]. The day of the Last Judgment was to be followed by the golden age. It would the end of the 'curse' of man [*Isa.*24.6,19-23,25.7] (Knight, 1959, 342). The striking feature of the Old Testament salvation (in contrast with later Christianity) was its undeniable '*naturalness*'. There was nothing incorporeal about salvation, as nothing incorporeal was in the state of original innocence. This '*naturalness*' of the vision of human life had much in common with Stoicism. The primeval precept to procreate as a mean to the survival of mankind was an expression of

the ultimate value of the natural human life. Originally, salvation was a promise of the survival of the chosen people for generation to come through the righteous works under the Law. The later vision of salvation was of the resurrection, following upon God's judgment, as the eternal prolonging of a righteous natural life in its most glorious manifestation. Still, Old Testament salvation could not be earned otherwise than through by the work of God's law, through obedience to His Commandments.

The idea of grace, which played so powerful role in the later Christian doctrine of salvation, had its Old Testament roots, too (Buber, 1961, 86). So, as Paul cited [*Rom.9.9*], God said to Moses [*Exod.33.19*]: 'I... will be gracious to whom I will be gracious, and will shew mercy to whom I will shew mercy'. So God's mercy was beyond human understanding (id., 86). Still, contrary to Paul [*Rom.9.18*], the hardening of the heart was not completely at God's will [*Exod.33.19*] (ibid.). The Old Testament 'hardening', unlike God's mercy, meant intervention in a case of 'an extreme perversion in the relation of an individual or a nation to God', when the 'going-astray' had been made by God into an inevitable destiny with no return (ibid.). The hardening was of man's own making as in the case of stiff hearted sons of Israel mentioned in *Ezekiel 2.4* (ibid.). This view of 'the hardening', as a punishment for man's own wrong doing, paradoxically reinforced the (Pauline) objection to the Old Testament Law as ruled by the fear of outward punishment. There could not be salvation by means of grace and the gift of the spirit outside the Law. It was rather, that the gift of the spirit led to the fulfilment of the Law. The fear of God (and His punishment) was inseparable from the 'inward' acceptance of one God, the faith which differentiated the Old Testament Jew from the Pagan.⁵ In fact,

⁵ The idea of the non-existence of God lay outside the realm of the thought of the ancient Israel (Buber, 1961, 38).

the internal Commandment to believe God laid the foundation (and precondition) for all other external Commandments of the Decalogue.

1.4. Summary of the Old Testament

The Old Testament Law was the revealed will of God, since ‘man’ and ‘nature’ had no meaning apart of being God’s creation. The law of human nature could not be a law of human reason, but only a law of God’s will. Men shared in God’s will (not in His reason) through Covenant with God and the performance of the righteous works under the Law. The particularity of the *voluntarism* of the Old Testament was, thus, in its *legalism*, the idea of the will of God as lawgiver being revealed in the external precepts of the Law. In the Old Testament a man was seen (and judged) through the prism of his deeds in accordance with God’s Commandments, in contrast to the Stoic vision of man ruled by an ‘internal’ right reason as manifestation of *logos*, which pervaded nature.

The Old Testament vision of nature as God’s creation (in history) was indeed different from the Stoic vision of cyclically reborn nature. It was the will of God, not any all pervading reason (*logos*), which created nature and man. In sharp contrast to the Stoic concept of cyclical time, the Old Testament had a notion of history as a manifestation of God’s will, history, which would have an end just as it had a beginning in God’s creative will. The late Old Testament idea of salvation in history became of paramount importance for Christianity (and presented a challenge for the concept of natural law). However, aside from this fundamental disparity of creationism and pantheism, the Old Testament and Stoicism had some similarity. It was the vision of human life as ultimately

natural corporeal life.⁶ The similarity in the Old Testament and Stoic visions of creation opened the way for the early Christian synthesis of the Old Testament and Stoic ideas of the *image* of God in man (the endowment, which lifted him over the rest of creation). The Christian idea of natural law was rooted in the notion of man made in God's image, who, due of his special place in creation, received of God's Law.

2. New Testament Voluntarism

The focus of this section will be on the comparison the different attitudes toward the Old Testament legalistic voluntarism, as represented by Matthew's account of Jesus' teaching, and Paul's interpretation of it.

It will be argued that the New Testament response to the Old Testament legalistic voluntarism was not of one voice. Matthew did not see Christ's teaching being against the Old Testament Law, but rather as bringing up the true meaning of the Old Testament legalism as a preparation through the works in this life to eternal salvation. Paul, in contrast, was inclined to discard the legalistic voluntaristic notion of the Commandments as irrelevant for salvation. Instead, he brought forward a new anti-legalistic voluntaristic meaning of salvation (as the whole and only purpose of human life) by God's grace.

2.1. The Background of Early Christianity.

⁶ This corporeal understanding of the naturalness of human life manifested itself in the Old Testament vision of salvation. Old Testament salvation amounted to the eternal prolonging of the natural corporeal life, as lived accordingly to God's revealed will under his Commandments. It grew out of idea of God's people natural survival for generations to come. Even in post-exile Judaism (where salvation was seen as

Jesus Christ and his Apostles were the Jews by birth, and some of the first Christians, like Peter, continued to be practicing Jews even after becoming Christians. The lasting significance of the Judaic inheritance was, however, not so much in the presence of the practicing Jews among the first generations of Christians, but in the endorsing of the Old Testament, by the side of the New Testament, as a sacred Scripture of the Church. Thus, the whole set of ideas of the Old Testament became an integral part of the Christian heritage, including the distinctively Judaic conception of God, as present in history, indeed of history as a manifestation of His will. Hence, salvation was conceived in historical terms. For Jews and Christians history will have an end just as it had a beginning in God's creative will. In respect to natural law this Old Testament heritage was not only in the concept of law as God's Commandments but also in the concept of man made in God's image and after God's likeness, so reflecting his special place in creation.

However, Christianity brought a significant innovation into the Old Testament tradition. It was in a new polarity of creation and salvation, the later being God's judgment upon history (Cohen, 1967, 15). A new Christian meaning of salvation was the outcome of an influence outside Judaism, since emerging Christianity was confronted not only by Judaism but by Hellenistic world as well. Hellenistic Neoplatonism influenced the Christian concept of eternal salvation as life of the spirit as opposed to life of the flesh. Thus, it contributed to the emergence of Christian *anti-legalist voluntarism*, with its ambiguous attitude toward the natural life and, hence, toward the idea of natural law.

compensation for the suffering of this life) it still had a meaning of the coming fulfillment of the natural life of the people.

Nevertheless, there were cardinal differences between monotheistic Christianity, on one side, and Pagan pantheism, on another side. The core of the Christian – Pagan antagonism has been described by Aleksei Losev in his monumental history of the aesthetics of antiquity, as a conflict between the Pagan vision of a thing (body, animating nature) with the Christian vision of a person (society, history), embodied in the ideas of creation of nature by the supernatural person and salvation of this sinful world by God as a person (incarnated in the person of Jesus Christ) (A. Losev, 1992, 62).

2.2. The Gospel of Matthew and Jesus' Sermon on Mount: New *Legalism*?

The focus of this part will be upon Matthew's vision of Christ as a reformer of the Law. It will be claimed that while Matthew saw Christ as a reformer of the meaning of the Law, Christ's reformed law still had to Matthew a *legalistic* meaning, in as far as salvation was seen depending on works done according to this Law.

The Gospel of Matthew's account of Jesus' Sermon on the Mount laid down the Christian vision of the Law. Was the new law in accord with the Old Testament Law? How was the new Christian vision of human life brought by Christ different from the Old Testament one? It will be argued that Matthew's position was twofold. Firstly, he attempted to redefine the Law from the higher ground of the new Christ's appeal to the 'inward' adherence to the Law, in the place of merely outward adherence to it of the Pharisees. Secondly, Matthew was confronted with the need to find a place for the new Christian vision of salvation.

2.2.1. Jesus as the New Lawgiver

With the fading away of the initial Christian expectations of the end of the world Matthew (more than any other of the Apostles) saw Christianity as a way of life and a path of duty (Houlden, *Ethics and the New Testament*, 47-8). The Christian way of life was built on 'an already persisting foundation, the Jewish Law' (ibid., 48). So Matthew reported in 5.17 Jesus' words that He came not to breach the Law but to fulfill it. Though Matthew's precise meaning of the fulfillment of Law is a matter of debate, the passage 5.17-9 as a whole does affirm the continuing validity of the Law as whole (Mohrlang, 1984, 8-9). Still, Matthew clearly did not hold that the entire Law was of the equal significance.

In accord with the general New Testament bias against the Pharisaic 'outward' adherence to the Law, Matthew downplayed the literal observance of the ritual precepts. The ritual prescription to wash hands before eating was dismissed. The ritual commandment to observe the Sabbath was relaxed to allow the treatment of the sick [12.10-3]. This dispensation was justified by the Old Testament precedent [*Lev.24.9*]. Still, Matthew omitted the more radical statement of Mark [*Mark 2.27*] that 'Sabbath existed for man, not man for Sabbath' (Houlden, 1973, 50).

To Matthew, Jesus had deepened the meaning of righteousness [5.20]. On the basis of the Old Testament commandment that forbade killing, Jesus proclaimed the new commandment to forgive [5.21-5]. He replaced 'eye for eye' by 'turn the other cheek' [5.38-42]. Instead of the Old Testament 'love your neighbor and hate your enemy' He said [5.43-4] 'Love our enemy and bless those, who curse your'. The two commandments of the Law were the primary ones: to love your God and to love your neighbor as

yourself [22.37-40].

Did Matthew's Jesus reinterpret the Law in a new *non-legalistic* sense, which emphasized not deeds but intentions? In Matthew's Gospel account Jesus referred to Isaiah's prophesy in order to accuse the Pharisees in hypocrisy [15.7-8]. As the prophet claimed [Isa.29.13], the people approached God not by the tongue, nor by the learned precepts of the Law, but by the heart [Matt.15.8-9]. Real corruption arose from the evil temptation of the heart [15.17-20].

Jesus' attitude to the Law should be considered in respect of the internal as well as external precepts. In respect to inward righteousness Jesus gave the internal precept of love and forgiveness in apparent conflict with the Old Testament legalistic 'eye for eye'. Still, there was a *non-legalistic* internal (and primary) precept in the Old Testament too: to believe in God.

In respect of outwards deeds, such as the external application of the new internal precepts of love and forgiveness, Matthew's Jesus did strengthen the Old Testament moral precepts. He reinterpreted them in the more strict legalistic terms. In this sense the yoke of Jesus' Law was not so easy and light. Jesus radicalized the meaning of a false testament by the prohibition of taking an oath, confining the testament to 'yes' or 'no' [5.33-7].⁷

Jesus internalized the commandment not to commit adultery by the precept to fight

⁷ Though, in a case of oath-taking it could mean a precept concerning primarily the Disciples going to spread the Gospel.

temptation itself [5.27-30]. Still, the internal precept to fight temptation in respect of adultery was transformed into the external precept of prohibition of divorce. Jesus sharpened the meaning of marriage by the prohibition of divorce [5.31-2]. The Old Testament [Gen.2.24] notion of man and wife as the 'one flesh' become [Matt.19.6] the unweaving command of monogamy. So the new commandment against divorce (apart of ground of adultery) was contrasted with the archaic Patriarchs' experience of polygamy as well as to a more liberal Jewish attitude toward a dissolution of marriage, as with merely temporal dispensations [19.8]. The Christian strict attitude to marriage sprang from the new ascetic morality. New Christian morality, such as a non-Judaic ideal of virginity, related to a new expectation of coming eternal salvation.⁸

Was, then, Jesus for Matthew a new lawgiver as well as a redeemer? Did Jesus bring a new 'covenant' of salvation? In Matthew's eyes, Jesus was a lawgiver, at least in the sense that Jesus' Commandments prevailed over the Law itself.

2.2.2. A New Antithesis of Natural Life and Salvation

Still, the main concern of Matthew was eternal salvation. This salvation was contrasted with the *natural* life. Only the one, who looseth his life for sake of God shall find it [10.39]. Life was more than feeding one's own flesh [6.25]. Because of a new Christian concern with eternal salvation, the concept of the works had changed. The Old Testament works under the Law were meant to enhance the *natural* life itself, with salvation being the ultimate glorification of the natural life as life on the earth and within the earthly

⁸ After resurrection, all would be as unmarred as God's angels [22.30] As Jesus said, there were eunuchs from mothers' wombs, there were man-made eunuchs, and there were eunuchs by themselves for the

community. In the Gospel of Matthew the coming heavenly kingdom to be earned by sacrifices of the natural temporal life. The eternal life was a compensation for those sacrifices by a grace of God. In this sense the yoke of Christ's law became light because of this new expectation of eternal salvation.

Yet, in a sense, grace and works were inseparable for Matthew. Nowhere did Matthew's Gospel say that a man outside the Law would not enter the kingdom of salvation. It was merely stated [5.19], that a man, who denied the validity of the entire Law would enter the kingdom as the least (Mohrlang, 1984, 18).

Overall, the Last Judgment would be by grace on account of the works of Christ's law. Grace would be given only to the righteous according to Christ's renewed Law. God would divide the people into sheep – the saved, and goats - the damned [25.32-3]; on those, who would have God's grace and the kingdom of God, and those, who would not [25.34]. Jesus said in the Sermon on the Mount [5.4-11] that those, who did hunger and thirst after righteousness, who were persecuted for righteousness sake, they would have the Heavenly Kingdom. They were those, who gave him meat, when he was hungry, who gave him drink, when he was thirsty, who took him in, while he was a stranger; those who clothed him, while he was naked, who saw him sick or came unto him in the prison [25.35-6]. And the righteous men asked, could they have done these things [25.37-40]? And Jesus answered: 'Inasmuch as ye have done it unto the least of these my brethren, ye have done it unto me' [25.40].

kingdom of heaven's sake; who could receive it let them receive it [19.12].

2.2.3. Summary of Matthew

Considered in the whole, Matthew's attitude to the Old Testament legalistic voluntarism was a complex one. The New Testament was deeply rooted in the Old Testament voluntarism. Righteousness lay in following God's will. Still, in Matthew's account, Christ did bring a new 'legalistic' interpretation of righteousness.⁹ Christ brought the true internal meaning of God's Law as a teaching of love and forgiveness to prepare to salvation. Christ spelled out this new meaning of internal righteousness as corresponding to the outward commandments of works. The core commandments of the Law were made harder, but the ritual precepts were relaxed. In no sense did Jesus abolish the Law, although he changed its emphases. The Law received a new meaning of self-sacrifice, suffering of thirst and hunger for a new righteousness sake. A new Christian eternal salvation was now a promise of reward for a humble life. Christ's law had a new preparatory role for a new righteousness of the heavenly kingdom, as a ground for the future judgment and grace, in contrast with the Old Testament meaning of the Law as a righteous way to live in the earthly community. While the late Old Testament idea of salvation was, in a sense, already in compensation for the suffering in man's natural life, in the New Testament suffering in the natural life became, in a sense, already a precondition for salvation.

2.3. Paul's *Anti-Legalistic* Voluntarism

⁹ Much later St Thomas Aquinas, very much in the spirit of the Gospel of Matthew, summarised the essence of new Christ's legalism. Christ did fulfil the Law in three ways (*Summa Theologica* 1.2. 107.2). Firstly, Christ declared the true meaning of the precepts; secondly, he prescribed more strict observance; thirdly, he added further counsels of perfections.

This part will deal with Paul's *anti-legalistic voluntarism*. It will be argued that, though taking over voluntarism of the Old Testament, Paul otherwise broke with the Old Testament naturalism and legalism, because of his preoccupation with salvation by grace.

Paul had a rather uneasy role in the history of the Christian natural Law. On one hand, he famously asserted the existence of natural law as written in the hearts of all men. On another hand, his almost savage attack on the legalism of the Old Testament did undermine the foundation of the Christian natural law as embodied by the Ten Commandments.

2.3.1. The Law of Nature as Written in the Heart, to Walk by God's Will

Paul provided the first Apostolic reference to natural law as to the 'law, written in the heart' of the Gentiles [*Rom.2.15*]. Nevertheless, this was not so much Paul's innovation, as the universalization of Jeremiah's prophesy of the law of God written in the hearts of all the chosen people [*Jer.31.33*].¹⁰ Notably, in contrast with the Stoic intellectualism, Paul, like Jeremiah, placed the 'law' in the heart. Like Ezekiel, then, Paul held that man should 'walk' by God's will rather than by human reason. Paul reinterpreted Ezekiel's story [*Ezek.36.27*] of man's 'internal' adherence to God's Law to imply that man should walk by God's spirit, which was special gift (grace) of God. God had sent the spirit of His Son into hearts of men [*Gal.4.6*]. For all who were led by God's spirit were sons of God [*Rom.8.14*]. Men, who had the first fruits of the spirit, groaned within themselves as they waited for adoption as sons and the redemption of their bodies [8.23]. Paul's law

¹⁰ Paul's dependence on the Old Testament in his famous notion of the Law as 'written in the hearts' of all men seemed to be overlooked by many commentaries, which instead emphasised Paul's Stoic connections.

‘written in the hearts’ (as in the later Old Testament) presupposed the possession of the spirit. Even, when he referred to man’s own consciousness and man’s own accusing thoughts [*Rom.2.15*], Paul could hardly have in mind the late Roman Stoic idea of all men sharing common reason.¹¹

Still, in Paul’s conception, the following God’s will lay not under any Old Testament bondage of fear. God was a spirit, and where the spirit of the Lord, there was freedom [*2Cor.3.17*]. The true knowledge of God was achieved through love, by faith [*1Cor.13.7-8*]. Paul’s ‘knowledge’ was not a Stoic sharing in the seminal reason pervading nature, but the Old Testament ‘sharing’ in God’s will. Though, in the Old Testament there was a different sort of the faith, where a love was blended with a fear.

2.3.2. The Attack on Law

Paul was of two minds. The law was written in the hearts. But was it the Old Testament Law? In his polemics with the Apostle Peter, the practicing Jew, Paul, the ‘Apostle of Gentiles’, implied that the Law was not necessary for the Gentiles [*Gal.2.14*]. Paul’s attitude to the Law was colored by a new-founded Christian universalism, as opposed to the old Judaic exclusiveness. As Paul famously said, there was neither a Jew nor a Greek; there were neither the bond nor the free, there was neither a male nor a female, for all was the one in Jesus Christ [*3.28*].

¹¹ Nevertheless, it appears difficult to deny that Paul’s usage of ‘consciousness’ did resemble the Stoic notion of assent. Such a Stoic usage was a sign of Paul being under Hellenistic influence. However, Stoicism was hardly a predominant influence on Paul. Neoplatonism, with its presumption of duality of spirit and body, was more important, by being indispensable for Paul’s doctrine of salvation. But even in this case, Paul hardly saw a duality of spirit and flesh in the intellectualistic sense of participation in ‘world intellect’. The central tenet of Paul still lay in the Old Testament voluntaristic idea of man being defined by his relation to the will of God.

It could be that Paul saw the observance of complicated ritual precepts of the Law as an obstacle to the conversion of the Gentiles to Christianity. But then the solution would be the separation of the Decalogue, the moral Commandments, from the ritual precepts. Since Paul did not implicitly distinguish between ritual and moral precepts of the Law, he might have disagreed not with its content but with its significance. Had Paul distinguish the ritual and moral parts of the Law, he might not have claimed that Christ redeemed men 'from the curse of the Law' [*Gal.3.13*].

However, Paul objected to the Law in principle. He charged that the Old Testament Law amounted to obedience to God through fear, and even with being opposed to faith and righteousness. Thus, the Jews were kept in captivity under the Law before faith came [*Gal.3.23*]. Paul contrasted the righteousness and the Law. The Jews had not attained a law of righteousness because they had sought it, not by faith, but by the works of the Law [*Rom.9.31-2*]. Abraham was promised to be a father of 'nation' not through the Law but through the righteousness of faith [4.13].¹² Under the Law men were the servants of sin [6.20]. Sin was in the world before the Law, but it was not imputed when there was no law, and, hence no trespassing [5.13, 4.15]. So the knowledge of sin was by the Law [3.20, 7.7]. With the advent of the Law, sin abounded [5.20].¹³ To Paul, a life under the Law was a struggle between the 'law of God' after the inward man and the 'law of flesh'

¹² Though, as was noted above, Old Testament Law was built on the primary internal precept of faith in God. So the Jews could not live under the Law without faith into the one God.

¹³ To Paul sin abounded with the imposition of Moses' Law. In the original state of Innocence natural law was 'written in the heart': man had natural inclination to good only. It was lost by Adam and Eve's Original Sin. Before the Law there was not a state of Innocence but a state of Ignorance. As Seneca noted in the state of Ignorance there was neither sin nor righteousness. The doing wrong was not sin as far as it was not recognised as such. Only under the Law righteousness had a meaning. Without the Law man remained in ignorance and could not advance to righteousness. Still the righteousness under the Law was not the righteousness of the Gospel. But could righteousness of the Gospel be achieved without preparation by the Law?

[7.22-5]. Man became a captive of the law of sin, which was in his flesh [7.23]. Man did not do what he wished and he hated what he did [7.15]. It was not man, who did it but a sin that dwelt in him [7.17].

Nevertheless, Paul himself conceded the preparatory value of the Law ‘until faith came’ [Gal.3.24]. On some occasions, Paul also appealed to God’s commandments, seemingly at odds with his proclaimed anti-legalism [1Cor.7.10,9.14,14.37]. Mohrlang suggested that Paul conceded the prohibitive value of the Law in curbing the obvious vices, though, he did doubt its power to evoke good (Mohrlang, 1984, 46). But why did Paul insist that the Law increased sin? Dodd interpreted Paul’s struggle with the Law as a moral conflict between the deeds, which could be controlled and desires which could not (Dodd, 1953, 75). Hence, it was meaningless to be proud of the deeds. Still, to Paul, it was not only that man should live by the *spirit* rather than by the *letter* of the Law, but the Law itself was immanently insufficient for salvation. Ultimately, to Paul, the Old Testament Law was a law of the flesh as a law of the temporal natural life. The true God’s ‘law’ was, in contrast, a ‘law’ of the spirit as a ‘law’ of the eternal salvation.

2.3.3. Salvation by Grace against Salvation by Works under Law

It seems that Paul was not so much doubtful of the existence of the Old Testament faith as such, as was discontented with the Judaic *legalistic* understanding of the righteousness through the deeds; indeed, with the whole Judaic idea of salvation as the prolonging of the natural earthly life. Paul’s intention, hence, was not so much to fight with the Law, but to strengthen a new Christian vision of salvation by election through God’s freely given grace.

Dodd noted that Paul's early negative attitude toward the natural life changed with the fading away of the expectations of the near end of this world and the coming salvation (Dodd, 1953, 113-6).¹⁴ Still, the expectation of salvation - either near or far - would not change the core dilemma: would salvation be by grace or through the deeds under the Law? In Sanders' view, Paul distinguished between being saved (by God's grace) and being judged according to works, so salvation through grace was not incompatible with punishment and reward for the works; the good works were the condition, though, they did not earn salvation (Sanders, 1977, 516-7). So, when Paul said in [Gal.3.11] that the just man lived by faith, and, no man was justified by the Law, he meant the Law would not suffice for salvation (ibid.). Still, nowhere did Paul endorse the view of Matthew, that the works were the necessary, although insufficient condition for salvation!

To Paul election (or salvation) was by the grace, not by works, otherwise the grace was no more a grace [Rom.11.6]. God's ultimate judgment of righteousness depended not on a fulfilment of the Law but upon the grace as a free gift of God, hence the righteousness from the Law was contrasted with the righteousness from faith [Rom.10.4-6; 9.30]. God's grace, not man's own earthly works, became the mean to salvation. For in Adam all had sinned, men were now justified freely by God's grace through the *redemption* that was in Christ [3.23-4)].

God, hence, was a *redeemer*, rather than a *lawgiver*. Paul's whole concern was with

¹⁴ Paul said (1 Cor.7.29, 31, 34) that time was short and this world was passing away and that family life belonged to 'the thing of the world' as opposed to 'the things of the Lord'. (Dodd, 1953, 115). In Colossians 3.18-22 there was already the Stoic exposition of tables of duties (id., 116). And in Ephesians 5. 21-33 love of husband and wife became a sacramental symbol of the love of Christ and the Church (id., 117).

salvation and righteousness, achieved by God's grace. Paul thus contrasted the Law of the temporal natural life (of flesh) to God's coming eternal salvation (of Spirit). Hence the whole picture of salvation had changed: it was now eternal salvation of spirit versus temporal life of flesh. In summary, Paul effectively integrated (something alien to the Old Testament) a Neoplatonic prospective of duality of bodily and spiritual life into the Old Testament vision of life and salvation by obedience to God's will. The outcome of it was (again, alien to the Old Testament) a dismissive attitude toward the natural life itself.

But would faith and grace abrogate the meaning of the Commandments? On one hand, man was justified by faith without the works of the Law [*Rom.3.28*]. But, though all things were lawful, not all things were expedient [*1Cor.6.12*]. It was not that man should keep on sinning so that God's grace would increase [*Rom.6.1-2*]. The body was not for fornication, but for the Lord [*1Cor.6.13*]. Hence, on the other hand, by faith (!) the Law was established (confirmed) [*Rom.3.31*]. Christ was the end of Law [10.4]. The ultimate fulfillment of Law (do not kill, do not steal, do not commit adultery, do not give false evidence, do not wish for another's possessions) was in Christ's precept to love of your neighbor as yourself [13.9-10]. Paul also said that the unrighteous would not inherit the kingdom of God: neither the fornicators nor the idolaters nor the adulterers nor the effeminate nor the abusers of themselves with mankind nor the thieves nor the covetous nor the drunkards nor the revilers nor the extortionists would inherit the kingdom of God [1 *Cor.6.9-10*].

It might be, then, that Paul accepted 'de facto' the Commandments not as the commandments, but as some 'evident' fruits of the spirit through the baptism (Sanders,

1977, 513).¹⁵ He enjoined virtues, not as inherently commendable, but as freely following from the possession of the spirit (*Gal.5.22-4*; Houlden, 1973, 26). Paul, then, like the early Stoics, saw natural law not as the commandments but as a virtue. In place of Sage's right reason he simply put the Holy Spirit. The true Christian would obey God's will not by the precepts but by unbleached inner character, without a need to restrain his inclinations. Remarkably, the anti-legalistic voluntarism of Paul looked very much like the 'internal' intellectualism of the early Stoics. It was not that there was no truth ('law') but that it was a gift of inward spirit, which made it known, very much like the early Stoic internal right reason which could be seen only by the sages. Though, to Paul, the spirit was not the Stoic 'corporeal' spirit (as 'breath' of corporeal rational soul, partaking in *logos*), but more like a Neoplatonic immaterial spirit, contrasted with body (matter), though not in the intellectualistic sense of a pure reason. Moreover, to Paul, in contrast to the Stoics, the spirit was not the sage's own right reason but a gift of free grace of God.

Man, being a slave of the flesh, and, hence, of sin, could not obey the Law inwardly but only outwardly. Hence, only by God's grace, not by outwards works under the Law, man could obtain true righteousness. To Paul, there was only the one state of righteousness (of grace), everything short of it was a sin, just as to the early Stoics there was the one state

¹⁵ Sanders in his *Paul, the Law, and the Jewish People* argued, nevertheless, that Paul was not against Old Testament legalism as such. In Sanders' words: '[Paul] does not say that the law was unable to be fulfilled by some and is therefore inadequate a means to righteousness; nor does he say that fulfilling it leads to self-righteousness on the part of a few.' (Sanders,1983) In Sanders' view Paul criticised Judaism for the lack of faith in Christ and the lack of equality for the Gentiles [*Rom.9.30-10.13*] (ibid.). Sanders considered that to Paul the Law could not lead to real righteousness which would come by faith in Christ [*Rom.10.3-4*]. However, to him it did not mean that Paul reproached the Jews 'for their zeal for pious work'. Indeed, nowhere Paul asked his followers to breach the Commandments and became murders or adulterers. But Paul's apparent tolerance of *de facto* observance of the Commandments would do little to alleviate the main argument underlined the Pauline anti-legalism: the Law was irrelevant for salvation as achieved not by meritorious works by free grace of God! Nevertheless, Paul's attitude to the Law was a reflection of inner contradiction of anti-legalism. But to say that anti-legalism of Paul was self-contradictory is not the same as to say that Paul did not advance a new anti-legalistic vision of man living by God's will as manifested by His grace.

of virtue (of the sage with right reason). Still, like the Stoics were confronted with a question of the indifferent (to a virtue) but still the preferred things (in accordance with nature), Paul was confronted with a question of whether it was indifferent how to live while waiting for God's grace. Paul, then, had no choice but effectively to concede that for not yet righteous man it still better to live under the Law then without it.

2.3.4. Summary of Paul

Paul's *anti-legalism* could be explained by his new and overwhelming Christian concern with the coming eternal salvation. By itself, alone, this concern would diminish the value of the natural life in a relative sense. But, to Paul, the earthly life had not even a partial appeal. A life of the flesh was inevitably a life of the sin, if not on the level of deeds, then on the level of intentions or temptations. To him, the only mean to salvation was God's grace, which would remove the inner conflict of man's life as a life of flesh. Hence, the Old Testament's orientation to the works was not only unhelpful, it was misleading for the purpose of a true righteousness. Nevertheless, Paul, still, found it hard to say, that while man still waiting for grace, it was no better to live under the Law then without it.

To Paul, God's grace necessarily preceded righteous deeds, while to Matthew it followed them. As for Matthew, Paul's true righteousness was not a fulfillment of the ideal of the just life man in the earthly community as in the Old Testament, but a new righteousness of the heavenly kingdom. Though, to Paul, the heavenly kingdom was already in the life of the spirit, which had nothing to do with the life of the flesh. Eternal salvation though the spirit had received a new Neoplatonic meaning of a superior alternative to the temporal bodily existence, though, lacking a Neoplatonic

intellectualistic connotation of the spirit as a pure reason. Paul reformulated the Old Testament voluntaristic meaning of the law as God's will, rejecting its legalism. The new righteousness lay in an inward following of His spirit, not in the outwards following the Commandments. This new righteousness was achieved by men with a gift of spirit. So God's spirit occupied the place of the early Stoic 'right reason', that was given to the sages only. The 'Christian sages' were not of their own making but of God's grace.

Paul laid the foundation of a new meaning of the original righteousness of man: his natural law was written in the *heart*, and man had no inclination to do otherwise. This was a new *voluntaristic* vision alternative to *intellectualism*. Paul's *anti-legalistic voluntarism* laid the foundation for the whole Augustinian tradition.¹⁶ The righteousness was in the inclination of the will in tune with the will of God. Man adhered to God's will not by the righteous deeds, but by the righteous will loving God.

2.4. Summary of the Old and New Testament

The Old and New Testament *voluntarism* shared a vision of man in the world as defined solely by his response to God's will, and represented a radical shift from the Classical *intellectualism*. However, there was a visible tension between the Old and New Testament versions of *voluntarism*. The Old Testament *voluntarism* was *legalistic*. The whole Old Testament prospective was of man being judged by his obedience to God's Commandments in his natural life works. This naturalistic vision of human life, as an entirely earthly, 'corporeal', the Old Testament shared with Stoicism, in spite of the

fundamental discrepancy of Stoic intellectualism and Old Testament voluntarism. By contrast, namely in this vision of life of man lay a point of contention between the Old and New Testament.

The New Testament vision of man's life went beyond the Old Testament promise of the natural life fulfillment through outward deeds. In the New Testament, Christ was not only a law-giver but also as a redeemer, who brought a promise of eternal salvation. To Paul, the Old Testament *legalistic* vision of rewards in this life, according to judgment of deeds in this, life had nothing to do with salvation of the inward spirit. Still, Paul did not discard the Old Testament *voluntarism* as the conception of man's living by God's will. But to him true righteousness lay in the internal (willing) adherence to God's will through the gift of the Holy Spirit. To Paul, the supremacy of the will of God over the will of man was signified by His free grace in the order of salvation. Paul fatefully originated a new kind of *anti-legalistic voluntarism*.

The subsequent natural law theory was not, and could not, be built upon a Pauline *anti-legalism* that denied the natural life itself. There could be no 'natural' law attached to the natural life, if, in this life, there was no righteousness apart from by God's free grace, outside of any law and by no man's own efforts.

Still, Paul's assertion of natural law as 'written in the heart' provided the early Christian Fathers with the first Christian reference to natural Law. Paul's reference was essentially of the Old Testament 'walking by God's spirit'. But, on the surface, this vision bore a

¹⁶ Pauline voluntarism was to have a long history. It was again revived with the Reformation in Luther's and (to lesser degree) Calvin's Protestantism. The profound anti-intellectualism of this radical Protestant voluntarism has been emphasized by J.B. Schneewind in his *Invention of Autonomy*.

resemblance to the later Roman Stoic vision of natural law as common reason implanted into all men, and in such a sense that it was interpreted by the early Christian Fathers. This Stoic intellectualistic vision together the Old Testaments *legalistic* idea of the Law as God's will revealed in God's Commandments provided the foundation for a Christian natural law concept.

Chapter 4

Patristic Natural Law

The subject of this chapter will be the Church Fathers' visions of natural law. The chapter advances several theses:

First, the early Fathers (especially Irenaeus and Tertullian) sought to intellectualize the Old Testament's voluntarism, and to play down the differences between Old Testament legalism and New Testament Pauline anti-legalism. To these early Fathers, natural law as a 'law of original human reason' became a law of God's revealed Commandments after the Fall.

Second, Ambrose sought to transform New Testament voluntarism into Stoic intellectualism. To Ambrose, natural law as a law of the Christian Sage's right reason became a new law of salvation.

Third, Augustine, neoplatonizing the New Testament voluntarism, stressed the gulf between the 'earthly city' of the Old Testament (and Stoicism), and the 'heavenly city' of the New Testament (and Neoplatonism). To Augustine, after the Fall the law of earthly life was not a law of intact nature, and had nothing to do with salvation. To Augustine, with his Neoplatonic contempt for the life of flesh, there was hardly a place for natural law. Like Paul he was anti-legalistic voluntarist.

The contribution of this chapter lies in putting a new perspective on the role of the early Christian Fathers, Irenaeus and Tertullian, as the true founders of the Christian vision of natural law, through the synthesis of Stoic intellectualism and Old Testament voluntarism. Another contribution of this chapter may be seen in its outlining the futility of those visions of natural law built on the Pauline anti-legalism by the later Christian Fathers. Thus, Ambrose's attempt to intellectualize of Paul's anti-legalism amounted to a utopian vision of natural law, one confined to the Christian sages aiming to earn the eternal life, and which had a little following in the history of the Christian natural law. Augustine's advancement of the Pauline anti-legalist voluntarism had, in contrast, important consequences for the Christian idea of natural Law. On one side, his development of the concept of the will as defining man's relationship with God, aside of reason, prepared the ground for the subsequent Scholastic conflict between ideas of voluntarism and intellectualism. On another side, by adopting the radical Pauline voluntarism, Augustine effectively proved the impossibility of any anti-legalistic idea of natural Law. To him, after the Fall, any law of human natural life lacked justice or righteousness.

The first section will treat the early Fathers - Irenaeus and Tertullian - who intellectualized the Old Testament legalistic voluntarism and laid down the foundations of legalistic voluntaristic and legalistic intellectualistic versions of Christian natural Law.

The second section is concerned with Ambrose's utopian synthesis of Stoic intellectualism and the neoplatonized Pauline voluntarism.

The third section will deal with Augustine's revival of Paul's anti-legalistic voluntarism, with its vision of inherent incompatibility of the corrupt earthly life with the heavenly life of salvation; a vision that undermined the idea of natural law.

1. Early Christian Fathers

1.1. The Hellenistic Intellectualistic Background

The point of this section is to underline the complexity of Hellenistic influences on the Christian Fathers, besides of that of Old Testament voluntarism.

The initial Christian attitude to the Classical Paganism was defensive and hostile. The foundation of this hostility may have been the apparent corruption of Pagan life, or the Christian apocalyptic expectations, or a mixture of both. Nevertheless, the early Christian Fathers were deeply rooted in the Classical vision of rational nature. Here Stoicism met Neoplatonism in its shared Classical premise of the intelligibility of nature to man.

The common Classical intellectualistic vision of man as possessing reason in the image of God was of a primary importance for the Christian natural law. The task, faced by the early Christian thought, was to integrate this notion of man created with reason in the image of God with the Old Testament's notions of the image and likeness of God.

Paradoxically, the one of the most complicated issues in the Christian thought became judgment upon natural earthly life as such. This unease was due to the influence of the Neoplatonic doctrine of salvation and eternal life. In contrast to the Stoics, the

Neoplatonics stressed the duality of natural , bodily, and spiritual life.¹ This Neoplatonic idea of life of spirit opposed to the bodily life was completely unlike the Stoic vision of the bodily life pervaded with reason. The attractiveness of Stoic vision of the body animated by the soul-reason, was, to the early Christian thinkers, in its resemblance of the Old Testament Genesis' story of the formation of man by God's breathing of life into the clay of creation. The difference, though, was in the idea of reason, which was absent in the Old Testament.

As a result, early Christian thought was confronted, on one side, with the Stoic and the Old Testament's vision of natural bodily life as the only possible reality, and, on another side, with the Neoplatonic vision of the dualism of natural bodily life and the eternal life of pure spirit.

Neoplatonism was already latent in Paul: in his vision of duality spirit and flesh and of adherence to God' will through the gift of the Spirit. Nevertheless, the early Christian Fathers were immune from Neoplatonism as far as they were consumed with fighting the Gnostics' neoplatonized heresies.² The Gnostics believed in the extreme polarity of God (spirit, or light) and the world (matter, or darkness). One of the main Gnostic targets was the Old Testament and its 'alien' God. The goal of the Christian orthodoxy,

1 The founder of Neoplatonism was Plotinus, who lived in 3rd century AD. He advanced the doctrine of a hierarchical universe. The ultimate reality was represented by the infinite unknowable One, who emanated the divine mind (*nous*), who, in his turn, emanated the world soul. The world soul generated the lesser human souls. The world soul was placed between *nous* and the lower material world. It could either arise in contemplation to eternal *nous* or denigrate to temporal carnal world. Plotinus brought forward the categorical opposition between spiritual and sensual, developed from Plato's dualism of idea and matter.

2 Gnosticism (from *gnosis*- knowledge) was a complex religious movement of the second and third centuries reflecting the eastern Mysticism as well as Platonism. The Gnostics attempted to personify the Platonic categories of knowledge. The Gnostics reinterpreted the New Testament story about Jesus Christ as the mystical teaching about knowledge. They adhered to the ethical dualism as the eternal cosmological opposition of the high (good) and low (evil) principles. In respect of man it reflected in the

in contrast, was to prove that there was One God of the Old and New Testaments.

Instead of Neoplatonism, the early Christian Fathers absorbed Stoicism and the Old Testament legalism. Thus, they developed a natural law vision as a story of the original natural law of human reason, given to man in the image of God, but obscured as a result of the original sin, then, recovered in the Commandments as the written natural law, and, still, further enhanced by the law of the Gospel for sake of progressing to the ultimate kingdom of just and abundant natural life. Nobody could claim the more credit for the planting the seeds of this early Christian vision of natural law than Irenaeus and Tertullian.

1.2. Irenaeus

Irenaeus' (c. 126-200), bishop of Lyon, was one of the Greek Apologists. As an early Apostolic Father, he contributed to the establishment of Orthodoxy in the struggle against of the Gnostics. It was the time when the Christian vision of natural law was a 'battleground' of the rival influences: the Old Testament voluntarism as well as the Stoic and Neoplatonic intellectualism.

It will be argued that Irenaeus made a major contribution toward the development the Christian concept of natural Law. In contrast with Paul, he returned to the Old Testament meaning of the human life as essentially natural life. His achievement lay in the synthesis of the Old Testament and Stoic notions of law in his vision of natural law

dualism of soul and body. The Gnostics too asserted the duality of the Old and New Testament (and their Gods).

as a life of reason in adherence to God's Commandment; a vision, which arose out the bringing together the Old Testament and Stoic notions of man made after the *image* of God.

The peculiarity of Irenaeus was in his faithfulness to the Old Testament vision of creation and salvation. Still, confronted with the Gnostic attacks on the Old Testament, Irenaeus was forced to 'modernize' by adopting some tenets, such as the intellectualistic concept of God, absent in the Old Testament. In his *Against Heretics* (*Adversus Haereses*) he discussed the Gnostic doctrines in the Neoplatonic terms employed by the Gnostics. In Osborn's opinion, the conceptual framework of Irenaeus, including his celebrated distinction between *image* and *likeness*, had the Platonic connotation of distinction between participation and identity (Osborn, 2001, 258-9). It can be shown, however, that Irene's' visions of soul and God's *image*, and of human reason were not of the Neoplatonic kind, but rather mixture of the Old Testament and Stoic influence. The whole Irenaeus' vision of salvation was deeply rooted in the Old Testament, though it might be that his conception of the spirit had Neoplatonic connotations.

While repeating, after the Gnostics, that God was 'all mind and all *logos*', Irenaeus insisted that it was beyond the 'inflatable reason' [of man] to conceive the 'unspeakable mystery of God' (2.28.5-6). He, therefore, shared anti-intellectualism of Paul: 'knowledge puffeth up, but love edifieth' [1Cor.8.1]. Thus, man, who imagined himself to discover 'the causes of the number' of all created things, thought himself no inferior to God and exalted his own opinion above the greatness of the Creator (2.26.1, 3).

Irenaeus' more humble opinion of human reason was rooted in his Old Testament belief

in the free will of God in creation (2.2.1). Man being a creature of time in contrast to uncreated (and so timeless) God, 'received grace only in part' and being not 'yet equal or similar to His Maker', unlike God could not 'experience or form a conception of things' (2.15.3).

Still, some things which fell under man's observation and were 'set forth in the sacred Scriptures' were placed by God within rational power of man and subjected to man's knowledge 'by means of daily study' (2.27.1).

1.2.1. Creation with Reason as a Power over Oneself in Image of God

Irenaeus' notion of man made in the *image* of God was derived from the Old Testament account of the creation [Gen.2.7], where soul was understood as 'breath-soul' proceeding from God and animating the body. Referring again to the Old Testament [Isa.57.16,42.5], Irenaeus saw the breath of life (afflatus) as the common lasting possession of living men in contrast to vivifying Spirit [being gift of grace to a few] (5.12.2). Irenaeus' innovation was to incorporate the Stoic vision of creation within the Old Testament one. This breath of life [soul] made man alive and endowed him with reason (AH 5.1.3). Like water which took the shape of the vessel, a soul took shape of the body (2.19.6; Osborn, 220). The body was 'an instrument in the hands of craftsman', i.e. the soul, which ruled over the body (2.33.4).

Irenaeus' idea of the soul resembled the Stoic vision of it as 'breath', or *logos* 'penetrating' the body. This vision of soul-reason was the most natural for Irenaeus to adapt, because it so well fitted with the Old Testament notion of image as God's given

breath-soul, inseparable from the body. Due to those Old Testament connotations, to Irenaeus, the image of God was instantiated in a bodily human nature as ‘mixture of that fleshy nature which was moulded after the image of God’ (5.6.1). In the anti-Gnostic polemics Irenaeus referred to the *image* of God in man as possessed in his (bodily) ‘formation’ (5.6.1). So man (as a living soul) was an admixture of soul in body. Human body, though not itself soul, was in a fellowship with the soul (2.34.4). Soul was not itself life, but partaking in life (ibid.). It was, though, not the Stoic world-soul, but the personified ‘living-soul’ of man in the Old Testament sense. Irenaeus adapted the Old Testament vision of the image of God as a principle of bodily life, which he reinterpreted in the Stoic sense of soul-reason. This Old Testament notion of the temporal and personal ‘breath-soul’, that was contained in and intermingled with the body, had little in common with the Neoplatonic notion of incorporeal reason by illumination, or a participation overcoming the corporeality of created things. The whole of Irenaeus’ emphasis was upon human reason in God’s image implanted in the human soul and rooted in the natural bodily life. The image of God was embodied by the soul in unity with the *body*, and manifested in human reason dependent upon the natural life experience.

Through the original, if at times confused, interpretation of the Old Testament’s ‘man made in the image of God’ Irenaeus brought forward a new meaning of rationality as a free power of choice.

In the image of God man received a soul, endowed with a power of reason, conceived as power over oneself. Irenaeus brought this point home by insisting that, in comparison with ‘wheat and chaff, being inanimate and irrational... by nature’, man ‘being endowed

with reason and in this respect like to God (!) having being made free in his will and with power over himself" (4.4.3). Thus, man, being 'himself the cause to himself', could become 'wheat [something of value], and sometimes [worthless] chaff' by his free choice (ibid.). So man, as 'having been created a rational being', should be 'justly condemned', when he lost 'the true rationality, and became opposed to the righteousness of God, giving himself to every earthly spirit, and serving all lust' (4.4.3). Irenaeus usage of the loss of 'true rationality' in this contest referred to man's self-inflicted failure to distinct between good and evil rather than to the depraving of human nature after the Fall.

From God man received a mental power to know the good of obedience, and the evil of disobedience (4.39.1). Man, who shunned the knowledge of good and evil, in fact divested himself 'of the character of human being' (4.39.1). Anyone, who did not attain this knowledge, was 'the cause to himself of his own imperfection', like those who blinded themselves from the light given by the Father were 'involved in darkness through their own fault', and not because the light did fail (4.39.3). 'Man had his own power of decision, just as he had his own life, so he might freely fall [in] with God's command without compulsion from God'(4.37.1). It was also in man's power to disobey God (4.37.4). A 'power of accepting and achieving good, and the power likewise of spurning it and failing to achieve it', was given to man to be able to achieve good, which was 'achieved in fullness as result of obedience to God' (4.37.1-2, 4). To Irenaeus, man, was by nature able to discern good and evil, though, he could fail to do it.

Irenaeus ingeniously explained how through the experience of God's punishment for disobedience, and reward for obedience, man was moved to perceive that good meant 'to

obey God, to believe in Him, and keep His commandment' (4.39.1-2). For 'just as the tongue by means of taste' gained the 'experience of sweet and bitter', likewise the mind experienced good and evil, discovered that disobedience was 'evil and bitter' and learned what sort of things were contrary to 'goodness and sweetness', and thereafter it did not 'attempt even to taste of disobedience to God' (ibid.).

The image of God was in a man as a living soul (in union with body). It was reflected in man's reason, as a power of judgment in accordance with God's Commandments through the experience of good and evil. The observance of God's commandment, thus, followed from the life guided by reason in the image of God. To Irenaeus, man came to the knowledge of good and evil by the lessons of experience through God's guidance (rather than like the Stoic sage by *a priori* reasoning). Irenaeus' 'reason' resembled the Old Testament's wisdom achieved by awareness of the will of God, who revealed His wisdom by showing His judgment (through punishment or reward). But Irenaeus' advance on the Old Testament position was in the emphasis, he placed, on man's power over himself, which denoted human rationality. By insisting on man's inner power to chose to follow God's Commandments, Irenaeus was able to combat Paul's claim, that the Law implied the merely outward obedience.

1.2.2. Salvation through Likeness in Spirit

The Genesis account of creation referred not only to man made in the *image* of God, but also man made after His *likeness*. Irenaeus sometimes used 'image' and 'likeness' interchangeably (cf. 4.37.4). However, it might be argued that he also gave a good reason

in favor of the distinction between these two notions in respect of man after the Fall.³ To Irenaeus, it was in the meaning of their future reunion in salvation that ‘the image and likeness must be held together’ (3.32.2).⁴ Irenaeus distinguished between ‘image’, on one side, and ‘likeness’, or ‘similitude’, on another. The image referred to soul-in-body endowment with reason, which continued even after the Fall. The likeness referred to man's original righteousness lost after the Fall and will be recovered in salvation through the gift of the spirit.

It may be, however, a matter of dispute as to whether the likeness to God was an original endowment of man. Harnack thought that the likeness was not given by nature, but was brought about by union with the spirit (5.6.1), so man, being ‘of an animal nature’, possessed ‘the image in his formation (in *plasmate*) but not ... the similitude through the spirit’ and was therefore subject to growth (Harnack, 1958, 269 n.1). In Cairns’ opinion, Irenaeus’ notion of the man ‘of animal nature’ in 5.6.1 referred to depraved human nature after the Fall (Cairns, 1973, 80-1, 292 n.3). In Cairns’ reading of Irenaeus, man had lost his original righteousness as a result of the Fall (id., 80). Man was created after the image of God to be precious to his Father, but ‘wherefore he did easily lose the similitude [likeness]’ (5.16.2).

Man’s rationality in the image of God, his power of free choice, was not and could not have been lost. What was lost was a true and higher likeness to God in His spirit.⁵ By the separation of ‘image’ and ‘likeness’ Irenaeus was able to explain the change in man's

³ Fantino’s interpretation of distinction of *similitude* as *image* in reason and free will, and as *likeness* in spirit could be found (Behr, 2000, 90-1; Osborn, 2001, 214-5).

⁴ The point seemed to be overlooked by Osborn (Osborn, 2001, 213).

⁵ The notion of Holy Spirit grew out the separation of the Old Testament notions of soul and spirit, with the Spirit became a gift (grace) of God (Niebuhr, 1941, 163).

nature after the Fall, when the likeness to the spirit of God was lost. Still, God had predestined that the first man should be of the animal nature, that he might be saved by the spiritual one (3.22.3). Adam's condemnation was incurred through his disobedience and his punishment was mortality. But he was loosed from the bonds of his condemnation (3.23.1).⁶ Adam repented, and God bestowed His compassion upon those who repented (3.23.5).

The likeness to God in man denoted the indwelling spirit of God, which was not part of man's nature after the Fall, but a supernatural gift of the spirit to the believer, besides the body and the soul (Cairns, 84). Man then received 'a certain portion of His spirit, tending towards perfection, and preparing for incorruption, being little by little accustomed to receive and bear God' (5.8.1). In Cairns' view, Irenaeus here referred to man's perfection eschatologically, being a subjection to God as 'continuance in immortality', when man was 'rendered after the image and likeness of uncreated God', so 'having been created... [then] having received growth, ... having been strengthened,... having abounded, having recovered [from sin], ...being glorified' (4.38.3; Cairns, *ibid.*).⁷ Perfection would come with possession of the spirit [likeness in addition to image] as man becoming capable of beholding Him in contrast with the man [of animal nature], who did not receive perfection from the first, 'being as yet an infant' (4.38.1). The perfect man constituted 'in the commingling union of the soul receiving the spirit of the Father and the admixture of that fleshly nature which was moulded after the image of God' (5.6.1). The gift of the

⁶ For God was neither devoid of power nor of justice to help man and restore him to His own liberty (3.23.2).

⁷ By Christ's incarnation not only the image was confirmed, but the likeness too was re-established 'after a sure manner, assimilating man to the invisible Father through means of the visible Word' (5.16.2).

Spirit prepared man for incorruption (5.8.2).⁸

Irenaeus' vision of salvation was the Old Testament's one: the coming of the eternal kingdom of the glorious natural life. Irenaeus saw the promise of salvation as a promise of the inheritance of the earth, and as a logical completion of the creation (5.36.3) He ridiculed the Gnostic future incorporeal kingdom as being against Christ's promise to the Apostle to drink the fruit of the vine together 'in my Father's kingdom' in [Matt.26.27] since it would be impossible if the kingdom was incorporeal (5.33.1). Instead he referred to the Old Testament promise [Isa.64.4] of the renewal of the face of the earth (ibid.).

To enter the eternal kingdom of salvation, man needed to be not only in the image but also after the likeness of God. The likeness was achieved by gift of the spirit. In accord with Irenaeus' optimistic vision of creation, the growth of human reason led to the

⁸ With respect to his usage of 'spirit' (as distinct from 'image' in reason), Irenaeus undoubtedly on some occasions used 'to be like' or 'in likeness' in a sense of the man's continuing power over himself (as a power of free decision) in the *image* of God, without producing the new understanding (4.4.3, 4.34.4, 4.38.4). Nevertheless, at whole, Irenaeus saw likeness through the gift of the *spirit* as a way to salvation. Although the exact Irenaeus' meaning of 'spirit' was not always clear. 'Spirit' as if sometimes had Neoplatonic connotation of 'light'. It was a pure true reason. As such it was contrasted with merely partial reason of the image in the soul-in-body as 'realization of good and evil' through the life trial. Thus those who were 'not enslaved by lust of flesh' and who walked 'according to the light of reason' were subject to the Spirit (5.8.2). Possibly in this sense the lost 'true rationality' could be understood to be acquired again in salvation (4.3.3). The spirit of God so could be seen as sort of the Neoplatonic purified illuminated supernatural reason. Salvation then would be an achievement of a true rational knowledge by sharing in divine substance by illumination of the spirit. But in this case Irenaeus' vision of salvation should be the Neoplatonic one, a future kingdom of pure incorporeal existence. But that was not the case! Lawson gave an alternative interpretation of Irenaeus' notion of the spirit (*The Biblical Theology of St Irenaeus*, 155-6; Cairns, 1973, 108-9). Spirit meant ethereal, pure and incorruptible substance through which man was partaking in divine nature (ibid.). Irenaeus did imply, after all, that men had been made by God 'at first merely men, then at length gods' (4.38.4). Such 'divinization' of the believer was a sort of spiritual inoculation: if due to the organic connection with Adam all men were fallen, so by the fact of incarnation all were automatically saved (Cairns, 1973, 109-11). Cairns strongly denied such 'unbiblical' possibility in Irenaeus (ibid). It might be unclear whether the gift of the Spirit as unconditional promise of salvation could imply the 'divinization' of the believer somewhere in the New Testament (id., 51). However, one such New Testament reference could be to Peter's speaking of the Gospel 'by which he has granted to us his very precious and very great promises, that through these you may escape from the corruption that is in the world because of passion, and become partakers of the divine nature' [2 Peter 1,4] (ibid). Still by the 'occasional error of conceiving of salvation as divinization' Irenaeus demonstrated a possibility of the Stoic-like corporeal notion of spirit.

eventual salvation as a never ending continuation of the natural life in a state of glory.

1.2.3. Natural Law as a Story of Life-Growth from Creation to Salvation

To Irenaeus, man being in the image of God received his reason as power over himself. Man's rational power over himself made man made him to comprehend natural law as God's Commandments. Man's life in accord with Cod's Commandments, i.e. with natural law, was a precondition for him receiving likeness in the spirit of God in coming salvation. To Irenaeus, natural law, given to man in his creation, already bore a promise of salvation applied to this world. Irenaeus hold an optimistic vision of man upon who God, 'bestowed the faculty of increase on His own creation', was called 'upwards from lesser things to those greater', just as infant,' was conceived in the womb' and brought 'into the light of the sun' (2.28.1). God, being 'one the same...made the things of time for man, so that coming to maturity in them' he might 'produce the fruit of immortality' (4.5.1).

At first God warned men through natural (law) precepts that were necessary for salvation, which He implanted in mankind (4.15.1). In virtue of his power of free decision man was able to perceive God's Commandments (4.39.1-2). Regrettably, men 'turned themselves to make a [golden] calf [in the place of God]'⁹, therefore they were placed in a state of servitude, which nevertheless did not cut them from God, but subjected them to the 'yoke of bondage' (of the ceremonial Law) (ibid). On account of men's 'hardness' Moses enacted certain precepts (or dispensations), like divorce (4.15.2). God thus gave to Moses

⁹ Irenaeus referred to Exodus 32. [*Deuteronomy* 9.6-29], which described that while Moses was receiving the Commandments at Mount Sinai, the Jews turned away from God and made the golden calf as an idol.

the (written) Law, which testified of sin, but it laid a weighty burden upon man, it merely made sin to stand out in relief, but did not destroy it (3.18.7). Man's disobedience to God, as one of the child to the parent, led to the need for correction. Irenaeus was, in Carlyle's view, the first writer to introduce the explanation of origin of government as a remedy for sin (Carlyle, 1928, 1,129).¹⁰

Irenaeus adhered to the Pauline notion of natural man [*Rom.2.27,29*], who was 'justified by the law of nature', even before the giving of the Law. Irenaeus, though, insisted that (after the Fall)] the law of nature was kept only by those who were 'justified by faith and pleased God'. Hence, only the righteous fathers had a meaning of the Decalogue 'written in their hearts and souls' and were able to love God and not to injure their neighbors (4.16.3). In Irenaeus' view, God preserved man's power over himself, while He issued exhortations in order that those who did not obey would be condemned, but those who did obey and believe Him should receive immortality (4.15.2).

Natural (law) precepts, being common to the Jews as well as to the Gentiles, had a beginning in the Old Testament, but it was in the New Testament that they received growth and completion (4.13.4). The difference between the laws of the Old and New Testaments, was a difference between obedience and liberty, being servants and being children (4.13.2). As Harnack noted, Irenaeus had proved how little the Old and New

10 To compensate for man's depravation, the law and compulsion were divinely introduced to guide men by fear (5.24.2). Due to man's departing from God after he Fall, men ended in hatred of his fellow-men, 'engaged without fear in every kind of restless conduct, and murder, and avarice'; then as a remedy 'God imposed upon mankind the fear of man' and 'subjected men to the authority of men' in order to compel them to 'some degree of justice... and mutual forbearance' (5.24.2). Earthly rule had 'been appointed by God for the benefit of the nation', that was by means of the establishment of laws men might keep down an excess of wickedness among the nations' (ibid.)

Testaments contradicted each other.¹¹ Referring to [1*Cor.*7] Paul's acceptance of marriage as concession and lack of commandment of virginity, Irenaeus concluded that even Christ's new Covenant contained concessions, granted to the frailty of man (4.15.2). Christ not only had not commanded His disciples to do things contrary to the Old Testament Law but even forbade them from the longing after such things (4.13.1). Instead of giving injunctions Christ had widened the Commandments. So he commanded to give willingly rather than yielding to necessity (4.13.3). Irenaeus' view was akin of Gospel of Matthew. Jesus' emphasis on the internal adherence resulted in the additional commandments, rather than abolition the Law. It was only 'statutes and judgment' [of the ceremonial law], which were cancelled by Him in the new covenant of liberty (4.16.5). Jesus was a new lawgiver in the sense of widening the Commandments of the Law. Irenaeus appealed to the Gospel of Matthew [*Matt.*5.20,21,22,27,28,33] to insist that Christ's task was not to destroy the Law, but to fulfill it' (4.13.1).

In summary, natural law was a law of the natural earthly existence. And those who did truly obey natural law to love God and his neighbor as announced in the Gospel will be endowed with the spirit in salvation as an eternal prolongation of the natural life in a state of glory.

1.2.4. Summary of Irenaeus

The whole story of creation and salvation was a story of the original gift of natural law as a law of reason 'written in the heart', its partial loss after the Fall, with the consequent reminder of it through God's Commandments, and, at last, the new state of righteousness

¹¹ Harnack, 1958, 310, the end of the note from 309.

under the Gospel and the promise of salvation by gift of the holy spirit. But Irenaeus was far from contrasting natural life under the Commandments, in a virtue of man being with reason in the image of God, and salvation by the spirit after the likeness to God. The latter reflected rather a 'natural' growth of man from infancy to maturity enriched by gift of the spirit. Irenaeus did not share Paul's Neoplatonic presumption of opposition between natural life of the flesh and the eternal life of the spirit. Salvation was an ultimate fulfillment of the natural life.

Irenaeus originated a fateful division between *image*, as natural endowment of reason, and *likeness*, as gift of the spirit. This distinction opened the way for the subsequent idea of separation the spheres of natural life and natural reason and of eternal salvation in the spirit. The notion of man's depravation from the likeness of God after the Fall helped the development of doctrine of the original sin, as accounting for the loss of the likeness to God. The notion of man made with reason in God's image became one of the central tenets of the Christian natural law through the integration of the Old Testament's notion of man made in God's image with the Stoic notion of man being alike God in his reason. The Stoic meaning of God's image in right reason was reinterpreted by Irenaeus in the Old Testament sense of the adherence to God's Commandments. Irenaeus attempted to *intellectualize* the Old Testament *legalistic voluntarism*. By embracing the Old Testament adherence to the moral Commandments together with the Stoic insistence on God-like rational capacity of man Irenaeus was able to assert man's rational power of choice as a power to accept and achieve good. The notion of free will grew out of the synthesis of the intellectualistic meaning of a capacity for decision in man as a kind of sharing in the divine reason, and the voluntaristic meaning of responsibility for adherence to the God's Commandments.

1.3. Tertullian

Tertullian (c.155 - 222/223 A.D.) of Carthage was an early Latin Father. It was Tertullian, who memorably asked, *What has Athens to do with Jerusalem?*¹² His query did not, however, prevent him being a scholar of Roman Law and Greek philosophy.

It will be argued that Tertullian contributed to essentially the same ‘story’ of natural law as Irenaeus. His intellectualistic logic however was more precise. Natural law was a law of human nature as originally created by God, of man’s reason and mastery over himself. The original sin did not remove this original endowment, but diminished it. Thus, the written law was needed. Then, through the Gospel and its sacraments the original nature was restored as a means to salvation.

1.3.1. Stoic Corporealism

Tertullian, in comparison with Irenaeus, whose primary influence was the Old Testament, was a self-conscious Stoic. He explicitly stated the corporeality of the soul (in unity with the body). His ‘corporealism’ led him to the formulation of the doctrine of the original sin as an inherent corruption of human nature from Adam. He, like Irenaeus, sought to separate the original continual endowment with reason in the image of God from a higher likeness in the spirit to God, which was lost after the Fall. His vision of salvation was a vision of ‘corporeal’ resurrection, with

baptism curing ailing human nature. His original contributions to the Christian natural law were in a concept of the original sin as well as in his intellectualistic notion of reason as prerequisite for the moral self-government.

Tertullian's immediate task was to refute the Gnostic claim that the Fall could be imputed to God if man's soul was a portion of the spirit of God.

1.3.2. Image and Likeness

Tertullian sometimes used 'image' and 'likeness' interchangeably. God's image and likeness was in self-command, in a rational power of man over himself (*Adversus Marcionem (Against Marcion) (AM) 2.4-6*). The likeness to the form of God was in man's power over himself (2.5). Still, as Irenaeus before him, he distinguished between the likeness and the image of God. Though, he did not adopt Irenaeus' distinction between the image in reason (of the soul) and the likeness (in the spirit) literally, Tertullian introduced something similar to explain the Fall. He distinguished the soul, as the image of the spirit, from the spirit itself. What man had received as a soul was not the spirit itself but an *afflatus*, the spirit's gentle breeze, the life-breath, the image of the spirit (*AM 2.9*). The image provided the immortal soul with mastery over itself and power of understanding and knowledge, though it did not make man divine or faultless (*AM 2.9*).

To Tertullian, the 'breath of life', which made man into a living soul [Gen.2.7], was a proof, that soul had a form of the particular body throughout which it spread (*De*

12 (Apologeticus 38. 3; Deane, 1963, 10).

Anima (On Soul) (OS) 9). He shared the Stoic notion of the corporeal soul (*OS*), 1-9). It had a shape and was three dimensional. The natural condition of the soul was immortality, rationality, sensibility, intelligence, and freedom of the will (*OS* 38, 502). Just like the Stoics, Tertullian held the rational part of the soul to belong to its nature, since it proceeded from God, its rational Creator. Moreover for him, as for the Stoics, the soul and the body were in an inseparable unity. Tertullian believed that all reality, including the spirit, was physical (*corpus*) (Osborn, 1981, 85).

1.3.3. Original Sin

Tertullian originated the explanation of the irrational part of soul as an addition resulting from Original Sin (*OS* 16.1).¹³ Tertullian, thus, formulated the notion of the original sin, which became indispensable for the Christian thought (even though he did not use the term itself) (Osborn, 1981, 90n). As a result of the original sin, man lost his original faultlessness. To Tertullian, like Posidonius, the soul retained its rational faculty, but it now was forced to fight with own irrational impulses.

Tertullian's notion of a corporeal soul as a substance common to all man led him to the concept of the original sin as inherent corruption, a kind of the original bodily contamination. Man inherited sin through the corporeal soul, infected in Adam. Sin was transmitted through the soul (derived from Adam) as unifying substance.¹⁴ Man was corrupted in the soul 'at the very gateway of birth' with its original quality made obscured by an evil spirit (*OS* 39). The original sin was explained by

¹³ It was noted by Waszink in his commentaries on *De Anima*, 229-30 .

¹⁴ All souls derived from Adam. The different souls were 'not distinct species but accidents of the one nature and substance, namely which God bestowed on Adam and made the matrix of all' (*OS* 20).

the presence of devil in the world. The Devil had infected human nature by 'implanting the seed of sin', the lust of the flesh, unbelief, anger (*AM* 5.17). Still flesh was only an instrument of the soul it could not by itself command to sin (*OS* 40).

(Original) Sin was hereditary in the sense of being the condition of Adam's posterity, transferred through inferior nature of human reproduction. But it was a contagion rather than guilt (*AM* 5.17). When the soul was received 'in Christ' would it be made clean again (*OS* 40).

But the original sin did not completely corrupt man's rational nature, for what came from God could not be extinguished. The light of the soul could be obscured, but it could still cast its rays when it could find a way through. Though all souls were of the one genus, there was some good in the worst, some evil in the best (*OS* 41). Mind was a rational faculty of the soul (*OS* 12). The mind was 'sharpened by learned pursuits, by the sciences, the arts, by experimental knowledge, business habits, and studies' it was 'blunted by ignorance, idle habits, inactivity, lust, inexperience, listlessness, and vicious pursuits' (*OS* 20).

To Tertullian, like the Stoics rather than Irenaeus, the corruption of human nature was, thus, due to the soul's negligence, a kind of self-inflicted ignorance. However, in his anti-Gnostics polemics Tertullian also developed a notion of human reason as a free power of choice which went beyond the Stoic concept of rationality. Tertullian, like Irenaeus, defined human reason as a free power of choice to abide by God's Commandments. Tertullian had a new insight (which

was later shared by Suarez) that due to his possession of reason man was the subject to moral command. Man had not been given *dominium* over every thing in the world if he had not sway over his own mind (AM 2.6). The power of free choice was a kind of ‘weighter’ (as a witness) of good, granted to him by God. Thus, man could be good not only in accordance with creation but by his own choice; ‘being good as it were of the proper quality of his own nature’ (2.6). Man could be judged by God because he could make own judgment (2.6). It was only to man as a rational creature, that a law was given, as only man was constrained by his own rationality (2.4). Due to man’s power over himself it was in his power to render obedience to the Law (2.5). So the reason for imposition of the Law was given, then the reason for its observance followed, and the ‘penalty was ascribed to the transgression’ if ignorance of danger should encourage a neglect of obedience (AM 2.4).

1.3.4. Natural Law as Original and Everlasting Endowment with Reason

Tertullian, like Irenaeus, was confronted with a task of defending the continuity of The Old and New Testaments as the work of one God. The Gnostics had used Paul’s criticism of the Law to argue that the New Testament God differed, and was opposed, to the Old Testament God. Tertullian advanced the *intellectualistic legalistic* concept of natural law as a law of original human nature, which was beclouded by the Fall, but of which man was remaindered in the written Law and brought to perfection in the Gospel.

Due to his Stoic belief in the soul’s rationality, Tertullian held that all men

possessed the same initial knowledge of God whether they were Egyptians, Syrians or others (*AM* 1.10) By their common nature men rejoined in community (4.16; Osborn, 1997, 85-6). Nature was the rule for those without the Law to do (by nature) the things, contained in the Law (*AM* 5.13).¹⁵ The existence, goodness and justice of God, and moral precepts were known by natural reason (*De Corona* 6.2; Bettenson, 1956, 32).

The (Old Testament) Law was ‘His written law’, as His was Law of Nature (*AM* 5.13). The (Old Testament) law was promulgated by God not in severity, ‘but in the interest of the highest benevolence... aimed at subduing the nation’s hardness of heart, and by laborious services hewing out a fealty which was [as yet] untried in obedience’ (2.19).

The weakness of the Old Law was in the exclusiveness of the Law of Moses as given to chosen People. The distinction between [the Old Testament and New Testament laws] was the ‘distinction of dispensations, not of Gods (*AM* 5.13). It was God [Himself], who did remove men from confidence in His own Law to the faith of His Gospel [*Rom.*1.16-7] (*AM* 5.13)

Tertullian too, like Irenaeus, felt compelled to deal with Paul’s claim [*Rom.*3.21-2], that after Christ man was justified not by the Law, but by faith alone (*AM* 5.13). In Tertullian’s interpretation by His dispensation God enjoined those who ‘justified by faith in Christ and not by the Law to have peace with God’ (5.13). God possessed a bigger vision of truth, of which Law of Nature, the Law and the Gospel, were all

¹⁵ By the universal primordial law men received the precept ‘Be fruitful and multiply’, so matrimony itself could not be accounted as evil, though to differentiate ‘between a [normal] state and its excess’ limitations were set to it by the Law and the Gospel (*AM* 1.29).

part of. Tertullian's whole point was to reinstate the one God (against the Gnostics). Namely, in this sense Tertullian agreed with Paul [*Rom.10.2-4*] that Christ was to bring about the consummation (the end) of the Law (5.14). Notably Tertullian, like Irenaeus, referred Matthew Gospel [*Matt.5.17*] citation of Christ saying, that He came not to destroy the Law, but to fulfill it. He interpreted its meaning as coincided with Paul's [*Rom.13.9*] understanding the Christ's precept 'Thou shalt love thy neighbor as thyself' 'as the summing up 'the entire teaching of the Creator' (5.14).¹⁶

The Law and nature were vindicated by the Gospel and Christ (5.13). God's judgment was to be according to the truth (*AM* 5.13). Whatever nature taught it was by God. The law of nature was manifested in the written Law, both being the law of God. Due to his Stoic intellectualism Tertullian was especially inclined to see a law of God as the universal law of nature. The rational law of God as the universal law of nature was retold by the Law and refined by the Gospel.

Like Irenaeus before him, and with more ease due to his Stoic corporalism, Tertullian defended the bodily nature of man and its place in salvation (against the Gnostics).¹⁷ To Tertullian, through the redemption of Christ, man attained the 'likeness of flesh' (!), which 'would not be called spirit', if it was 'not susceptible of any likeness to the spirit' (*AM* 5.14). New sacraments, such as baptism, were meant to purify the bodily human

16 As Osborn noted the main preoccupation of Tertullian was the one God; so even his rejection of all violence was more obedience to [the letter] of the sixth Commandment than to (the spirit) of the Sermon on the Mount (Osborn, 1997, 229-30). 'If God be a God, He is to be feared...[so] he must be obeyed; but His one command is to love. Love springs from the fear which perfect love casts out' (ibid., 231).

17 His vision baptism as pre-requisite for salvation was again colored by his Stoic *corporealism*. Baptism provided the sacrament of salvation, the second birth, wherein the corruption caused by Original Sin

nature, polluted as result of the original sin. Salvation, the obtaining of God's kingdom, was bodily resurrection. Thus, the kingdom of God was denied 'to the works of flesh, not to the substance' of the flesh. How could the soul, 'the real author of the works of flesh', attain the kingdom of God, while the body, being nothing more than the soul 'ministering agent' should remain in condemnation? (AM 5.10)

1.3.5. Summary of Tertullian

Tertullian asserted together with Irenaeus the continuity of natural law, the Old Law and the Gospel which eventually would result in salvation (which he saw as a matter of corporeal resurrection). Natural law was given man due to the original endowment with reason in the image of God. Tertullian notion of the original sin provided the (missing) explanation, why the written Law was needed: because the original endowment became clouded by sin.

In contrast to Irenaeus, who was rooted in *legalistic voluntarism* of the Old Testament, Tertullian was the Stoic *intellectualist*. His Stoic presumption of inseparable unity of the bodily and spiritual life helped him to overcome the Pauline divide between creation in the flesh and salvation in the spirit. Likeness to God, to Tertullian, was a return to the original faultlessness [through the baptism and the holy spirit].

Tertullian's contribution to natural law was in defining natural law in unmistakably intellectualistic terms. To him, natural law was very much like the Stoic universal law of

would dissolve, the soul would behold its own light and the Holy Spirit would take it under its protection (OS, 41, 4; Waszink commentaries on *De Anima*, 453).

nature, though he made the allowances for the original sin. So natural law was a stock of evident knowledge in virtue of the common human capacity of reason.

Tertullian's vision of natural law was helped by his Stoic intellectualistic notion of reason. But, being a hostage of the Stoic intellectualism, to Tertullian, a free power of choice could only be amounted to a rational judgment. Tertullian's position was reminiscent of the middle Stoa. The irrational part of soul (irrational passions) was a source of corruption. Flesh was merely vessel of sin. This 'residual' irrationality of soul resulting from the original sin was the obstacle for fuller knowledge of God's law. Still, man possessed an overall rational soul in the image of the spirit. For the soul to achieve full rationality was to be made of the spirit. What then could be a salvation if not a full knowledge?! Tertullian's doctrine of the original sin explained why in the current human condition the original knowledge of natural law was obscured. The rational soul was partly corrupted by the original sin. But through the dissolution of this sin in baptism and the protection by the holy spirit the soul would achieve a new faultless rational status.

Tertullian was, nevertheless, *legalistic intellectualist* because he had a new insight, being already outside the Stoic concept of reason, that human reason as a power of choice was a prerequisite for man to obey God's Law. Only man, in a virtue of his reason, was capable of moral government. He could obey or disobey God. In the image of God man had sway over his own mind, so he was capable to fulfil God's Commandments.

1.4. Summary of Early Christian Fathers

In the course of anti-Gnostic polemic some early Church Fathers, such as Irenaeus and

Tertullian, reinstated the relevance and validity of the Old Testament, and, as a by-product, the validity of the natural life itself. In the process the Old Testament *voluntaristic* meaning of the Law was brought together with the Stoic *intellectualistic* one. Hence, as an offshoot of establishing the early Christian orthodoxy against Gnosticism, the Christian vision of natural law was formed. This was a law of the original human reason 'written in the hearts', which, as it was clouded by the original sin, needed to be restated in the written Law, and, in order for man to achieve salvation, then to be perfected in the Gospel.

The great achievement of the early Christian thought was in the distinction between the image of God in the soul - reason, and the likeness in the spirit. That distinction, however embryonic, laid the seeds of the conceptual separation of the natural life (under reason) from eternal salvation (under the spirit). It provided place for the human reason within the space of the earthly life. 'Image' was achieved in the natural life, lived by reason. 'Likeness' was achieved in salvation through a gift of the holy spirit.

Yet another innovation was the early Christian understanding of human reason as a power of free choice to obey God's Commandments. Irenaeus' concept of reason as power of free choice contained the germ of the notion of free will, later developed by Augustine. Even Tertullian, rooted in the Stoic intellectualism, had a new legalistic insight that rational power over oneself was prerequisite for obeying God's moral command. Such understanding went beyond the Stoic intellectualism (with the sage's right reason being merely a participation in the seminal reason, *logos*). This idea of moral judgment (in a virtue of man's power over himself) was dependant upon God's Commandments. There was no possibility of judgment in the Stoic Pantheistic nature.

The rational power over himself in the image of God was also precondition for man having *dominium* over the rest of creation.

2. Ambrose: Salvation in Spirit by the Christian Sage's Reason

Ambrose (340 – 397 A.D.), bishop of Milan and a later Latin Father, was one of the eight great Doctors of the Church.

It will be argued that Ambrose's place in the history of the Christian natural law was unique. Ambrose transformed the Pauline *voluntaristic* vision of the Christian virtues as gifts of the spirit into the *intellectualistic* Stoic vision of the Christian virtues as Right Reason. He attempted to 'neoplatonize' Paul's voluntarism and to assimilate it to Stoicism. Ambrose reinterpreted the natural inclination to self-preservation as embracing temporal as well as eternal life. Thus he was able to overcome the middle Stoic conflict of the self-advantage and justice. His vision of natural law was a shift from the early Christian Father's synthesis of the Stoic intellectualism and the Old Testament legalistic voluntarism. Ambrose' concern was with a new Christian meaning of salvation as going beyond to the Old Testament Law. Still to Ambrose man earned his salvation through his own rational striving to the Christian virtues.

2.1. Preparatory Value of the Law

Ambrose shared the Pauline anti-Law stance, at least partially. In the age of the Gospel only grace reigned. He followed the Pauline criticism of the Old Testament Law as a

law of sin. In his *Epistulae (Letters)* Ambrose agreed with Paul that without the Law a man was ignorant of his sin. Sin abounded because of the Law (*Letters*, 83). It was better to do things, which could not be avoided, without knowledge that it was sin, so in this sense the Law had ‘changed [to] its opposite’ (*Letters*, 83).¹⁸ His further thought was more consolatory. As Irenaeus and Tertullian, he used Paul’s criticism for the temporary justification of the Law. Adam blotted out natural law by his disobedience, caused by pride, losing the prerogative of nature and innocence through his Fall, so the written Law was needed to subdue man to God and to preserve the original law at least in part (*Letters*, 83).¹⁹ Although without the Law man’s fault was less, the Law taught humility (*Letters*, 83). The Law was useful by humbling man and breaking down Adam and Eve’s transgression (*Letters*, 83). The Law became necessary to loose a bond of Adam’s deception and to teach obedience (*Letters*, 83). Through the threat of punishment the Law was ‘a tutor’ for the imperfect people in want of judgment (*Letters*, 68). So the Law was passed to remove excuse for sin and, ultimately, ‘to redeem sin from sin’. Pride grew after sin, but sin (through the Law) caused subjection, subjection humility, humility obedience (*Letters*, 83). So ‘pride discovered the guilt and the guilt brought grace’ (*Letters*, 83). Fear would bring to liberty, then liberty to faith, faith to love, and love would obtain adoption, adoption inheritance (*Letters*, 69). To Ambrose, love was a pledge of grace. Whereas a slave acted in fear under the letter,

18 Before the Fall, in the state of Innocence, man would not need the Law because man would be naturally inclined to do right and never would think of doing wrong. In this sense natural law was ‘written in the heart’. After the Fall and before the Law man was already not in a state of innocence but in a state of ignorance. Man could be inclined to do wrong but he would be ignorant of it. A state of ignorance precluded man from awareness of either righteousness or sin. After the Law was given, men became aware of right and wrong. But the doing something known to be wrong was more sinful than the doing the same thing in ignorance. It was Paul’s point. However, as Seneca noted, the knowledge of right and wrong was the only way to the virtue. To Ambrose, by removing deception the Law taught obedience through feeling of guilt leading to redemption.

19 Had man kept natural law, implanted in his breast, man’s sin would be reprov’d or innocence would be justified by (only) fear of future God’s judgment, and the discovery of the secrets of the hearts would not harm man (*Letters*, 83).

a free man acted though faith under grace (*Letters*, 69). Still freedom was by nature more ancient than bondage. Freedom was by promise, bondage by the Law. Love belonged to freedom, fear to bondage. Still there was love of the Law and bondage of love (*Letters*, 47). The Law was a forerunner of love. The fear of the Law became the charity of Gospel (*Letters*, 47). In the Law there was ‘a part’ [of true law of freedom] in the Gospel there was perfection (*Letters*, 68, 83).

To Ambrose, the Old Testament was a substitution of the law of nature for the time of sin. He embraced the Pauline idea that in the age of Gospel the love (the charity of the Gospel) replaced the fear of the Law. Still, he was conscious to reconcile Paul's vision of the Gospel as liberation from the slavery of the Old Law with the early Christian Fathers' justification of the Law as necessary preparation for the Gospel. He stressed the significance of the Law in teaching of humility and subjection of pride. He already saw the fear of God as related to faith and faith to love of God. As to Matthew, to Ambrose man's love to God would bring inheritance (grace).

2.2. Freedom in Virtue by Right Reason

Next to Paul there was a Stoic influence on Ambrose. Ambrose reinterpreted the Pauline 'freedom in spirit' in a sense of the Stoic Sage's freedom (from passion) in right reason. This Stoic (Seneca's) influence was apparent in Ambrose's response to slavery. To be free was to have a free spirit. And to be a slave was to be fool by not riding own passions. Ambrose repeated the old classical thought that the foolish man could not rule himself, and man without a guide was -undone by his own desires- in order to state, like the Stoics, that -not nature but foolishness- made the slave (*Letters*, 54). Slavery thus was twofold - of body and of soul: men with mastery of body became free from sin and passions of the soul by having a free spirit. True freedom belonged to the spiritual man, judging for himself and judged by no other men (*Letters*, 54). Those were free, who abided by the true Law, stamped on the mind. Thus, as children, men were not slaves to vice, being free from greed and lust (*Letters*, 54). A man was free within himself by the law of nature (*Letters*, 54). Freedom was in virtue. The wise was always free, being a law unto himself (*Letters*, 54). The wise was free because he behaved rightly: he who acted with wisdom had nothing to fear, for he had freedom and power of doing what he wished, since he desired nothing but virtue and learning (*Letters*, 54). So to be free was to live by the law of nature, i.e., by right reason.

Man was made in the image of God and so had the freedom (*Letters*, 54). In his mind man was made to God's likeness being after the image of God - an invisible intelligence, clothed in human form (*Letters*, 49). Man was the most perfect from all creatures in the image and likeness of God, hence he had other creatures of the world subjected to him in recognition of a superiority of his reason (*Letters*, 49). In Ambrose, in contrast to Irenaeus, the image and likeness were understood interchangeably meaning right reason.

Thus, to Ambrose a wise man was akin to the stoic sage, who was beyond any passion. A wise man would not need the 'slavery' of the Commandments since he would freely follow his right reason. Only the Christian sage's way to wisdom lay with the Gospel and grace. Ambrose did not notice the contradiction, seen by Lactantius that the Christian message of love was at odds with the Stoic denial of affection.²⁰

2.3. Natural Law as Christian Virtues

The Stoic idea of natural law as right reason superior to any conventional rules of conduct provided Ambrose with the means to deal with the Pauline controversy about the Old Law. Ambrose joined Paul on the question of salvation as eternal life of the spirit. Still, he was also under the influence of the Sermon on the Mount. So he could not discard the Commandments completely. He was, in a sense, in between the Gospel of Matthew, with its stress on the Law as preparation for salvation, and Paul's message of salvation in the spirit outside the Law. The Old Law was to him the 'approximate' law of nature for yet not-wise men. The Christian natural law for the wise men could and should be a new law of salvation in the place of the Commandments.

Ambrose set out to reinterpret the Stoic notion of virtue from the Christian view of salvation. He undertook this task in his *De Officiis Ministrorum*, or *Duties of Clergy* (DC), mirrored Cicero's *On Duty*. Ambrose assimilated the Pauline idea of the Christian

²⁰ Lactantius (260 – 320 AD) wrote, 'How can charity be preserved where there is nothing certain which may be loved? If all are children of all, who will be able to love sons as his own, since either he does not know his own or he is doubtful of them? Therefore, the idea of community perishes for that one through Nature herself as reclamer.' (*Divine Institutes* 3. 21) Lactantius' target was Plato's ideal community (without families). But the same criticism could be applied to Stoicism.

salvation in the spirit by to the Stoic notion the sage's virtuous life by right reason. Ambrose's wise man was a Christian priest, who was akin to the sage in his unworldly life. Ambrose saw the Christian natural law as a law of *intellectual* virtue (duties) rather than of the *legalistic* Commandments. But he still was confronted with a question: was the Old Law in force, or was it amended, or abolished? Ambrose could occupy the extreme Pauline position, that the Law was abolished. But it would be against the spirit of the Mount Sermon and Matthew's Gospel. Ambrose thus attempted to reconcile the content of the Old Testament with the Gospel with a help of the Stoic natural law vision. Like Cicero, he saw virtues as duties, but he too was able to see them like inner commandments.

He distinguished two kinds of the Commandments, or duties; 'ordinary' and 'perfect'. (DC 1.11.36) The Old Testament Commandments were ordinary duties. Ambrose cited Jesus' message to keep the commandments, like Thou shalt do not murder; Thou shalt not commit adultery; Thou shalt not steal; Thou shalt not bear false witness; Honour thy father and thy mother; Thou shalt love thy neighbour as thyself [Matt.19.7,17-9]. Ambrose (DC 1.11.37) added to those ordinary commandments the perfect commandment of mercy, taken from the Sermon on the Mount [Matt. 5.44,19-21] A man should love his enemies and pray for those who falsely accuse and persecute him, and bless those who curse him.

By dividing commandments into ordinary and perfect ones, Ambrose cleared the way for the development of the Christian natural law on the lines of the Commandments. The Old Testament Commandments were supplemented by Jesus with the new inward commandment of love. However, Ambrose transformed this voluntaristic

commandment of love into an intellectualistic commandment of reason. Ambrose's project was to turn the Stoic natural law into an intellectualistic natural law built upon the Christian virtues as the perfect commandments of right reason. The ordinary Commandments were capable to be known and obey even by the ordinary man. But the Christian sage was already to obey the perfect of commandment of right reason.

Thus action of life was to be regulated by three rules (*DC* 1.24.105-6). Firstly, passion should not resist reason; with passion under the control of reason it would be easily to discover one's duties. Secondly, and thirdly, there should be moderation in endeavors and works, as well as in the order and timing things.

Like Cicero, Ambrose understood virtues as duties, but as the Christian duties not the Roman civic duties. In contrast to Panaetius and Cicero, he was less concerned with the natural inclinations. To Ambrose, the whole prospective of the human life thus shifted from the Stoic vision of human life as entirely natural to the new Christian vision of the whole purpose of human life culminating in eternal salvation of spirit. The new Christian virtues were the virtues helping to achieve this salvation. Those new Christian duties were derived by Ambrose from the Stoic cardinal virtues of prudence justice, fortitude and temperance (*DC* 1.24.115)

Prudence was in a search for the truth (*DC* 1.24.115).²¹ Prudence consisted in the choice of what might be good by knowing how to distinguish between things useful and the reverse (*DC* 2.9.49). It was ingrained in all living creatures to preserve their own

21 In accordance with human nature all men were endowed with a desire to search out the truth. But only a few men excelled in it by deep thought, careful deliberation and great labor in order to attain the blessed and virtuous life (*DC* 1.26.125).

safety and to strive for their own advantage (*DC* 1.27.128). Prudence was then practical reason directing preservation men's natural life.

Prudence, however, did not exist without justice. Justice assigned his own to each man without claim upon another and with the disregard of one's own advantage for sake of the good of all (*DC* 1.24.115).²² Justice, that held a society together, divided into justice proper and charity (or liberality, or kindness). Justice proper was a judgment what was due. Charity was showing goodness (*DC* 1.28.130). Charity in perfection consisted of two qualities: to wish well and to do well (*DC* 1.30.143). Justice, in accordance with Nature, firstly directed towards God; secondly, one's own country; next, towards parents; lastly towards all (*DC* 1.27.127). Ambrose borrowed the Ciceronian hierarchy of the civic duties only to reinforce the Christian priority of God. The foundation of justice was faith, for the hearts of the just dwelt on faith (*DC* 1.29.142). Classical virtue 'to give due' was transformed by Ambrose into a virtue of self-sacrifice. The Christian virtue of charity was supported by a faith inspired judgment that God's intended men to live together.

Ambrose's fortitude and temperance were unmistakably Stoic virtues, grounded in the detachment of the mind from external things. Fortitude was shown in undergoing labor and dangers (*DC* 2.9.49). The glory of fortitude rested on the courage of the mind rather than on the strength of one's body (*DC* 1.36.179). Fortitude of mind was twofold (*DC* 1.36.182). Firstly, it accounted all externals as being despised rather than sought after. Secondly, it strove after the highest and moral things (*ibid.*). Temperance

²² In accordance with the will of God and the union of Nature, men were to be of mutual help to one another and not to neglect their duty by the fear of danger (*DC* 1.28.132).

preserved the right method and order in all that should be done or said (*DC* 1.24.115). Temperance was in despising pleasures (*DC* 2.9.49). It was in tranquility of mind, which was in regard for what was virtuous and reflection on what was seemly (*DC* 2.43.219).

Ambrose subscribed to Posidonius' vision of the soul as capable of ruling by right reason, even if affected by irrational emotions. The virtuous soul was trained by pure thoughts to be undisturbed (by desires) to be true and virtuous (*DC* 2.38.200). The soul should guard itself against the irrational motions, that could break forth in a sort of rush (*DC* 2.47.237-8). The soul's force rested on reason and on passions, but if there was a natural force in every passion of man, yet the same passion was subjected to reason by Law of Nature (*DC* 2.47.238).

To Ambrose, man in this life should live by the consideration of the higher reason of self-abnegation. The true Christian followed not the wisdom of flesh, but the wisdom of God, whereby the things greatly valued in this world should be counted as a loss (*DC* 3.2.9). Blessed was a life, not valued at the estimation of outsiders, but known as judge of itself by its own inner feelings (*DC* 2.1.2). Reason and good works made man blessed in the likeness of God, with faith aiding to knowledge. By attaining to the truth man would preserve the likeness [to God] and he would be rewarded [on the Day of Judgment] accordingly. (*DC* 1.49.249). Faith had a promise of eternal life. Good works too had the same, for the upright man would be tested by his work (*DC* 2.2.7). Ambrose was rather anti-Pauline in his assertion that future life will be granted according to the works. But he reinterpreted 'the works' as performed under Natural Law based on the inward Christian virtues rather than under the outward Old Law.

2.4. Between Self-Advantage and Justice.

Like Panaetius and Cicero, Ambrose still saw right reason in a balance between useful (advantage) and just (duty).²³ Ambrose, like them, was also concerned with reconciling of self and common advantage. However, Ambrose solution was along Posidonius' and the early Stoic lines: in right reason but from a new Christian view of salvation.

From the Christian point of view, of course, everything was virtuous (just) and useful only so far as it helped the blessing of eternal life (*DC* 1.9.28). Usefulness was connected with the body as well as with godliness (*DC* 2.6.27). What could be more useful than to preserve the body unspotted and undefiled, its purity unsullied? (*DC* 2.6.24) What could be more useful than the heavenly kingdom attained? (*ibid.*) He who was wise for temporal matters, was wise for himself as far as he deprived another of something, but he who was truly wise looked to what was eternal and to what was seemly and virtuous, seeking what was useful for all (*DC* 3.2.12). So 'useful' coincided with 'just' and 'virtuous' (*DC* 2.6.24). The future judgment would approve those who put virtue above [temporal] utility whilst it would condemn those who preferred safety to virtue (*DC* 3.8.56).

Ambrose was, however, able to see the right reason of the sage against the background of human inclination to self-preservation. He, thus, as Cicero, saw 'common good' as duty of justice in conflict with self-advantage or expediency. While virtue had to do

²³ If man was confronted with choice of two virtuous (just) things and two useful things, he should choose what would be more virtuous and what would be more useful, and then to make a right decision between them (*DC* 1.9.27).

with moral dignity and integrity of life, utility (or expediency, or self-advantage) dealt with the conveniences of life.

Nature poured forth all things for all men for a common use, produced a common 'right' for all, but greed made it 'right' for a few (*DC* 1.28.132). By the very law of the Lord man should never deprive another of anything for own self-advantage (*DC* 3.3.19). By the law of nature there was one state of usefulness for all (*DC* 3.4.25). Nothing was more advantageous than to serve for common good. Nothing was more useful than to be loved by others (*DC* 3.4.29). All men belonged to one body [as community], though with many members, all necessary to this body (*DC* 3.3.18). As the whole body was injured in one member, so also the whole community of the human race was disturbed in one man (*DC* 3.3.18). The true law of nature bound man to show kindly feeling, so that all men should in turn help one another, as part of one body (*DC* 3.3.19). To Ambrose, a life of man and his own self-advantage was inseparable from the life of the community and common good. So the love for one's neighbor was a reflection of love of one-self. The Christian love and charity were indispensable for the life in community. The whole value of this life was to promote love and be rewarded by love of others. Ultimate self-advantage was in eternal life. In meanwhile it was in the just life in the society.

Ambrose still felt obliged to address another 'angle' of divergence between justice and expediency. He could not ignore the consequences arising from the self-abnegation and the contempt for the external world. Would, then, any work of self-advantage be reproachable? Would then only idleness be safe? No. The good of the community were to grow by its members' labors. The return on man's hard labor, such as in agriculture,

was justified. In agriculture the more man sowed, the greater he reaped, so the richer returns of man's labors were not gained by fraud, on contrary, carelessness and disregard for uncultivated soil were to be blamed (*DC* 3.6.38-40).

Ambrose then faced another difficult question (also discussed by Cicero). If agrarian production itself was honorable occupation, was then storage of excesses in order to sell at better prices' at the times of need a bad thing? Now man had ploughed, sown, tilled and his gathered good increased; he stored and guarded it. In the time of famine he sold it to the help of the hungry. The opportunity to buy was afforded to all; the injury was inflicted on none? (*DC* 3.6.39) No, because one should not do business at the expense of the other people's hunger. One's gain would be the public loss (*DC* 3.6.41). In the time of distress one's duty was to help. Ambrose, however, failed to note that if no one stored (in a hope to sell at better prices later), the famine could be much worst. To Ambrose, the Christian should do like Joseph, who opened the granaries to all and did not try to get the full price of the year's produce, but assigned it for yearly payment (*DC* 3.6.42). But even Josef made some arrangements to protect him from the losses.

Ambrose once again used the language of expediency in support of charity in his discussion of the expelling the foreigners in the famine. People should not expel strangers who otherwise provided their services to city in the time of famine (*DC* 3.7.45-9). It would not be expedient for the community.

So Ambrose did not deny expediency as such. But he denied the existence of self-advantage in separation from the advantage of society. In contrast to Ambrose, some the members of middle Stoa, like Diogenes of Babilon or Herato of Rhodes, saw self-

interest, as being itself beneficial to society, such as in a case of parents, providing for children. Ambrose's defense of the Christian virtue of self-abnegation was apparent in his yet another discussion after Cicero of the conflict of self-advantage and justice. Ambrose followed this line in the discussion Plato's tale about ring of Gyges, which made its owner invisible. Even if a wise man could gain a kingdom by committing crime without being detected and, moreover, was to endanger his own safety by not committing the crime still a wise man would rather risk his own safety than committed the crime and gained the kingdom (*DC* 3.5.32). A wise man obeyed by the rule of virtue, but not by the rule of fear or gain. The just man had within himself the law of his mind, and a rule of equity and justice; thus he was recalled from sin not by fear of punishment, but by the rule of virtue (*DC* 3.5.31).

Ambrose, thus, denied the legitimacy of self-interest in conflict with the interests of others. Ambrose, moreover, put a whole new Christian prospective on life in society, where the main value was a love for one's neighbor. The novelty of Ambrose's position was in recognition of the inherent value of man as a person that could not be overrun by the utilitarian consideration of common good. In a way Ambrose's notion of common good might be seen in accord with the modern economics notion of (utility) optimization, as the conditions where no one could be better off without making somebody else worse off. If it would not be possible to help one without injuring another, it would be better to help nobody (*DC* 3.9.59). On the example of shipwreck, mentioned by Cicero, Ambrose thus denied that it would to be better for common good that a wise man rather than a fool should escape from shipwreck. The Christian wise man would not save his own life by the death of another, lest in defending his life he should stain his love towards his neighbor (*DC* 3.4.27).

2.5. Summary of Ambrose

Ambrose did not dismiss the natural life and its works as irrelevant. The inner commandment of love was dictated by the Christian sage's right reason. The works under this commandment meant to prepare to salvation. Ambrose transformed *anti-legalistic voluntarism* of Paul into the Stoic *intellectualism*. Ambrose's Stoicism was, however, intermingled with Neoplatonism. Ambrose, like Paul, shared the Neoplatonic premise of duality of spirit and flesh, with the life of the spirit being superior alternative to life of flesh. Unlike to Paul, for Ambrose the life of flesh was a preparation for life in the spirit rather than to be irreconcilable with life of the spirit. Unlike Paul, he saw the spirit in right reason. True rationality was in eternal life of the spirit. Here his Neoplatonism halted.

Ambrose's innovation was to project this idea of salvation and eternal life into the Stoic vision of natural law as right reason. He though redefined 'right reason' in the Neoplatonic mode to suit the Christian emphases on eternal life. Lacking Irenaeus' distinction between God's image in man's soul - reason and His likeness in the spirit, Ambrose did not separate the sphere of Natural Law from the sphere of salvation. As a result, the natural inclinations to self-preservation and justice, as expressed by right reason were not and could not be in conflict. They coincided as far as rational inclination to justice was a manifestation of ultimate inclination to 'self-preservation' in the coming eternal life. The difference between the Christian and the Stoic positions was in the idea of after-life. To the Stoic, it was returning to impersonal life of the elements, to the Christian it was a personal after-life of salvation.

He did provide a twofold argument in favor of detachment from the temporal things. Firstly it was against man collateral interests, since this temporal life was to prepare to eternal life, and secondly, a life of temporal self-interest was damaging to the life in society. The true wise man would seek only after eternal matters, whereas man concerned with temporal things was wise only for himself at loss for others. The true eternal self-advantage was in justice, or charity, as dictated by right reason. The rewards of eternal life brought the most 'advantage'.

For Ambrose, preparation for salvation meant the attainment of the sage's right reason, helping by faith, and by works. Ambrose did not share Paul's outrage at the idea to be saved by one's own efforts. To Ambrose, grace meant merely the deserved reward. Faith was meant to bring right reason. Thus, Christian works in the natural life were the preparation to the coming salvation. The new Christian law of nature was a law of society to protect the weak and to prepare to eternal life. Still, Ambrose's Stoic individualism never let him to adopt the Aristotelian maxim of the prevalence of the society over the man. It was for man's own eternal advantage to be loved by others. Ambrose though did not prove, that justice coincided with self-advantage if the considerations of the eternal life were to put aside.

In the history of the Christian Natural Law Ambrose's Stoic intellectualism was rather an exception. It was in its essence the early Stoic intellectualism of the sages. Still, at its best in Ambrose, natural law could mean a rule for the sage natural life as preparation to eternal life. The Neoplatonic idea of eternal life as a life of pure spirit in contrast with the depraved temporal life undermined the relevance of natural law as vision of natural life. This Neoplatonism, latent in Paul with his anti-intellectualism, became apparent in

Ambrose, who transformed Pauline voluntarism into the neoplatonized Stoic intellectualism. Still, Ambrose lacked the radicalism of Paul's passionate anti-legalism, with its anti-thesis of natural life under the Law of flesh and future life of the spirit under grace. It was left to Augustine to go even further to assimilate the Neoplatonic intellectualism with Pauline radical anti-legalistic voluntarism.

3. Augustine and Depraved Earthly Life: Self-Love versus the Love of God

Augustine of Hippo (354-430 A.D.) was one of the four great Fathers of the Church.

It will be argued that the Augustinian legacy left to the medieval voluntarism was in his notion of the will as defined relation man to God, as well as in his contrast between *intact* and *depraved* human nature. Augustine, more than anybody else, was a Pauline voluntarist. By his doctrine of the salvation by God's grace he asserted the free will of God. To Augustine, like Paul, the earthly works (of the law) had nothing to do with salvation by grace.

The point of this section will be to underline the incoherence of Augustine's outlook on natural law; a mixture of the Pauline *anti-legalist voluntarism*, Neoplatonism and Stoicism. His main contradiction was in asserting of the naturalness of self-preservation together with unnaturalness of self-love. This assertion of unnaturalness of self-love had undermined the whole idea of natural law.

3.1. State of Innocence and Original Sin as a Corruption of Will

To Augustine, human conditions after and before the fall were set apart. But was there no continuity in human conditions? Society and family were part of the original blessing. Moreover, God as a creator, did laid down the original natural law as a dictate of self-preservation, impossible without self-awareness and, hence, self-love. Nevertheless, as a result of the original sin the earthly life was ruled not by love of God, but by self-love. Hence, self-love and, ultimately, self-preservation (!) were the features of the deprived human nature.

In the original condition men were given *dominium* over irrational creatures but not over each other (*De Civitate Deo, or City of God (CG)*, 19.15). Men were naturally equal and free (*CG* 19.15). God's intention [to create a human race from one man] was to show the unity of human society and the bonds of human sympathy not merely by likeness in nature but also by the feeling of kinship (*CG* 12.22). There was also a law of human reason written by nature in the heart of man of free will: man should do no evil to another, which he would not wish to suffer himself (*Letters*, 157.15; Dean, 1963, 280). There was the law [of nature] enjoining the preservation of the order of nature and forbade its disturbance (*CG* 19.15). The law of nature, laid by God in creation, as shared by men and beasts, dictated self-preservation (Dean, 1963, 87-8). A life of procreation in a family and society was a natural and an original human condition. God instituted marriage from the beginning by creating man and woman (*CG* 14.22).

As a result of the original sin the original state of innocence was lost. God's command demanded obedience, because it was to man's advantage to be in subjection to God and it was calamitous for him to act according to his own will

(CG 14.12). Through original sin the whole human race was corrupted. As punishment men became mortal and subject to oppression (CG 13.3).

Sin was man's will turning away from God (*On Free Choice of Will (FCW)* 2.20.54, 162). This was the original evil: man regarded himself in his own light, and turned away from the light which would make man himself a light if he would set his heart on it (CG 14.13). The evil will in man had begun from man's pride (CG 14.13).²⁴ Out of man's pretension to be master of himself, with his will corrupted, man had become at odds with himself, in slavery to his lower self (CG 14.15).²⁵ Man, who was made by God upright with a good will, after the Fall lost a true free will (CG 14.11).

The desertion of God was voluntary.²⁶ Only the will that could 'dethrone the mind from its citadel and despoil it of its right order'; it was within the power of man's will to determine what goods, eternal or temporal (*FCW* 1.16.34). Free will, always presented in man, though was not good all the time: it was good, while free of sin serving justice; it was evil, while free of justice serving sin (*Grace and Free Will (GFW)* 15.31). The precepts of God's Law would not be given unless man possessed a will of his own to obey God's commandments.²⁷ On account of man's desertion of [natural] law written in hearts that *one should not do to another that he*

24 Pride was a longing for a perverse kind of exaltation, fixated on itself (CG 14.13).

25 He was dead in spirit of his own will, but doomed against his will to mortal life and eternal death, unless saved free by grace (CG 14.15).

26 For 'if the will had remained unshaken in its love the higher changeless Good, which shed on it light to see and kindled in it for fire to love', it had not been diverted to follow its own desires (CG 14.13).

27 Command 'to work' was made to free will, though man should not take credit to himself for his good works and become elated over them as if they were his own (GFW 9.21).

would not have done to himself [Matt.7.12], a written Law had been given too (*Enarrationes*, Ps. 57.1; *Political Writings*, 154).²⁸

Still, grace helped to obey the precepts, and unless man had the spirit of grace to assist him, the Law would be only a power of sin [because concupiscence was increased and strengthened by the Law and its prohibitions] (*GFW* 4.8).²⁹ Grace helped a man to become a doer of the Law, and without such grace a man living under the Law would be merely a hearer of the Law (*GFW* 12.24).³⁰ Man needed God's grace to be made just when he was wicked and (then, again) not to fall (*GFW* 6.13).³¹ God worked in man a power of will without his co-operation, but once man began to will to bring himself to act, then God co-operated with man (*GFW* 17.33).³²

Although after the Fall man could not rise of his own will, still, man could embrace God with a strong faith, to love Him with an ardent charity (*FCW* 2.20.54). Thus, the punishment of sin had been turned to the promotion of righteousness: God had granted to (such great) faith a gift of grace that death had become the means by which men pass into (eternal) life (*CG* 13.4).³³

28 Who did teach one that he would have no man to come near his wife or to commit theft on him? (ibid.)

29 The Old Testament promises and gifts were of the earthly things, but by those temporal good eternity was signified (*CG* 4.33). The New Testament revealed what was veiled in the Old Testament, the knowledge that God, the one true God, was to be worshipped for the sake of eternal life.

30 By grace of God good will, once brought about, was empowered to fulfil God's commandments (*GFW* 15.31).

31 After true freedom was lost, it only could be restored by God, who had power to give it at the beginning (*CG* 14.11).

32 Here Augustine introduced the germ of distinction between 'inefficacious grace' (sufficient for the man in the state of innocence) and 'efficacious grace' (necessary after the fall).

3.1.1 Summary of Augustine on Original Sin

Augustine's fateful contribution was to develop of the notion of the will of man, aside of his reason. In contrast, to the early Christian Fathers the notions of man's reason and his free will were intermingled. The Augustian *de facto* separation of the notion of the will from the notion of the intellect created a prerequisite for the subsequent Scholastic 'battle of ideas' between intellectualism and voluntarism (although the focus would shifted from the will of man to the will of God) .

Augustine's preoccupation with the will was a result of his doctrine of corruption of human nature through the will specifically. In man's pride he loved himself above (or instead of) God. As a result of Original Sin man's good will was lost; the depravation will was linked to 'dead' spirit. Man turned himself away from a true light (God), and regarded himself in his own light, through his own lower desires. Against the Manichees, and in a defence of man's free will, and against God's complicity in the Fall, Augustine claimed that man's desertion of God was voluntary. Against the Pelagians, and in a defense of grace, Augustine argued that after the Fall the true, good, free will in man was lost and couldn't be reclaimed without God's grace.

He was, thus, forced to radicalize the meaning of the original sin as a break from love of God to self-love. There was love to God and no self-love in the state of innocence, and there was self-love and no love to God after the Fall. As a result, the

33 After resurrection, merited by obedience, man instead of being 'a living soul' would became 'a life-giving spirit' by heavenly gift, which changed his natural substance as animal body into spiritual body with incorruptible flesh (CG 13.23).

naturalness of self-love was effectively denied. But, didn't the original law of creation, laid by God, as a law of procreation, imply self-preservation as manifestation of self-love? Augustine's own concession to procreation was in a contrast to the memorable message of Jerome, the radical anti-Pelagian: 'Let him then be fruitful and multiply who intends to replenish the earth, but your company is in heaven' (*Letters* 22.19; Bonner 1963, 330). Jerome had no doubt, that a law of salvation was sharply opposed to one of procreation.

There was another uncertainty in Augustine's account of the state of Innocence and the Fall. The original natural law, which prohibited a disturbance of nature and to treat others differently than oneself, was written in man's heart. After the Fall the Old Testament Law was given as remainder of this original natural Law. Did then the Old Testament prohibitions of theft (or adultery) belong to the state of innocence?

3.2. Image of God as Reason empowered by Good Will

Augustine, like Ambrose, did not employ Irenaeus' distinction between *image* and *likeness*. Instead he developed his own concept of the *image* of God as related to his vision of Trinity of Father, Son and Holy Spirit in God. His vision of the image of God in man had resemblance to the Neoplatonic idea of contemplation of eternal forms of God's mind. He was, however, also influenced by the Stoic idea of self-awareness as 'sense-knowledge'.

God's image was in the rational or intellectual soul of man (in his mind), which enable him 'to use reason to understand and behold of God' (*De Trinitate, On the Trinity (Trin.)* 14.4.6).³⁴ This image of God still remained in man's reason, however effaced and disfigured (*ibid.*).³⁵ Yet the mind of man was itself weakened by faults, thus it had to be healed and renewed to enjoy light, to be impregnated with and purified by faith (*CG* 11.2).

True wisdom (*sapientia*) was distinct from knowledge (*scientia*): wisdom denoted the intellectual cognition of eternal things; science was a rational cognition of temporal things (*Trin.*12.15.25).³⁶ In *scientia* the matters were perceivable by the mind and reason by the mental process as a kind of [inner] sense (*CG* 11.3). This knowledge of temporal changeable reality was necessary to the conduct of man's life (*Trin.*2.16-7). Still, even this sense knowledge was not common to men and animals, but based on a human reason (*Trin.*1.2.3).

Man was wise not by his own light, but by participation in the divine eternal light (*Trin.*14.12.15). The knowledge of the creature was a kind of twilight, compared with the wisdom of the Creator, but it never declined into night, as long as the Creator was not deprived of His creature's love (*CG* 11.7). The more ardently man loved God, the more certainly he saw God and the unchangeable form of justice in God, and through this recognition lived in conformity with it (*Trin.*8.9.13). Though

34 The image of divine nature ought to be sought for and found in the best thing human nature had - human mind (*Trin.* 14.8.11). Man's power of reason in the *image* of God and this *likeness* to God was still to be found in the part of man, superior to the lower parts of his nature shared with the brute creation (*CG* 11.2).

35 A mind still possessed reason 'whether this image be so worn down as to be almost none at all, whether it be obscure and disfigured, or clear and beautiful' (*Trin.*14.4.6).

man's mind was changeable, there were unchangeable rules of justice, impressed upon it like the image from the ring passed into the wax, yet without leaving the ring (*Trin.*14.15.21).

The partial image of the Trinity of the Father, His begotten Son and a Holy Spirit (of eternity, truth and love) was reflected in the trinity of the mind (*CG* 11.26-8). The will of God, just as love, belonged to the Holy Spirit; and love was in the will (*CG* 15.20). Mind remembered itself by inner memory, mind understood itself by inner understanding, and mind loved itself by inner will (*Trin.* 4.9.10).³⁷ Still, the trinity of the mind (*memoria, intellegentia, voluntas*) was in the image of God, not because the mind remembered understood and loved (willed) itself, but because it also remembered, understood and loved Him, by Whom it was made (*Trin.*14.12.15).³⁸

3.2.2. Summary of Augustine on Image

Augustine's notion of image embraced Irenaeus's 'image' as well as 'likeness'. It included a power of the will to love God, which could be bestowed only by grace (gift of the spirit).³⁹ As Bonner noted, Augustine understood likeness to be participation (Bonner, 1987, 500-1). Augustine's notion of *likeness* in the spirit was ultimately the Neoplatonic one - contemplation of the eternal idea's of God's mind

36 In respect of the invisible things, which were out of reach of the interior (or exterior) perception, man could learn them through the mediator, through the prophets, God Himself, or the apostles (*CG* 11.3).

37 Nothing could be more present to itself than itself, so the mind knew itself in itself, not as the result of imagination as if it touched the things outside of itself by senses (*Trin.* 10.10.16).

38 To love God meant to perceive Him steadfastly with mind (*Trin.* 8.4.6).

(id., 504-5). After the Fall a man could reacquire a good free will only with help of grace, love of God being the precondition for true wisdom in the image of God. The image of God was ultimately not in memory, knowledge and love of self, but in memory, knowledge and love of God. Augustine's *voluntarism*, thus, ultimately expressed itself by means of the Neoplatonic *intellectualism*. As a result, Augustine voluntarism outreached itself. In a such Neoplatonic world, there was no place for any distinction between the divine will and intellect. It was already left to the Scholastic voluntarists to develop the consistent theory of relation the divine will to the divine intellect.

Augustine's another, now intellectualistic, ambiguity lay in his notion of self-knowledge (self-awareness). It was a kind of the Neoplatonic contemplation, disconnected from the external senses. In this Neoplatonic sense self-awareness, as expression of self-love, was a kind of reminiscence of the original love of God, of the original knowledge of the eternal things (in the mind of God), which had become disfigured after the Fall. However, as Sullivan noted, Augustine's assertion of perpetual self-knowledge was self-contradictory in the face of his denial of the Platonic reminiscence and pre-existence of the soul (Sullivan, 1963, 148).

This Neoplatonic vision of self-awareness, too, left no place for earthly self-love. Earthly self-love, nevertheless, was a precondition of the original [natural] law of creation as a law of the earthly self-preservation. O'Daly pointed out the dependence of Augustine's notion of 'internal sense' in explanation of sense-

39 The participation of soul in God (by gift of the Spirit) would bring the image to perfection, though soul (mind) could carry on (some rational) existence without it, while retaining the (potency) capacity for the participation (Cairns, 1973, 106).

knowledge upon the Stoic idea of self-awareness, integral to their doctrine of *oikeiosis* as self-preservation (O'Daly, 1995, 103).⁴⁰ Augustine asserted that even after the Fall human reason would bear at least the partial image of God. This was reflected in the knowledge of the external temporal things, sufficient for earthly life. This knowledge of external things was, in fact, impossible without self-awareness (inner sense). Still, it was earthly, not heavenly knowledge. Human reason regarding the external temporal world was, then, a part of the original (!) image of God in man, applied to the earthly creation. It was the Stoic like knowledge of the external things, arising from senses, but controlled by right reason.

3.3. The Earthly City

Augustine's vision of natural life as inherently corrupt was reinforced by his antithesis of temporal life in 'earthly' society and eternal life of salvation in heaven.

Earthly life was ruled by human desires, being manifestations of self-love. Earthly life was created by self-love reaching to the point of contempt for God: It gloried in itself, looking for glory from men (*CG* 14.28). Even its wise men lived by men's standard and pursued the [earthly] goods of the body or their own mind, or both, exalting themselves in their wisdom under the domination of pride (*CG* 14.28). Man in this earthly life lived by the standard of the flesh (*CG* 14.4). The earthly city had its good in this world, rejoicing to participate in things of this world (*CG* 15.4).⁴¹

40 As Cicero pointed out (*On Ends* 3.16), unless young animals had self-awareness, (that is, ultimately, self-love), they would not strive after anything.

41 The earthly goods thus included, first of all, the body and 'goods of the body', such as sound body, keenness of sense, strength, beauty, some were necessary for the useful arts, others were of less value. Next came freedom, though not true freedom, but which made man to think that he was free when he had

The purpose of earthly life was the earthly peace, because man's use of the earthly goods was related to the enjoyment of the peace (*CG* 19.14).⁴² Men, being, in a sense, natural beings, could have no kind of existence without some kind of peace as the condition of their beings (*CG* 19.13). Even the beasts safeguarded their own species by a kind of peace, by begetting and bearing young (*CG* 19.12). But man, much strongly than a beast, was drawn by the laws of nature to enter upon fellowship with all his fellow-men (*ibid.*).⁴³

The society of mortal men had spread everywhere over the earth, amid all the varieties of geographical situation, and, while each group pursued its own advantage and sought the gratification of its own desires, men were linked together by a kind of fellowship based on a common nature (*CG* 18.2). Human society divided at three levels; it began with household, proceeded to the city and then arrived at the world (*CG* 19.7). A man wished to be at peace in his own home, so, facing disobedience, he subjected his domestic society to himself as a head of family (*CG* 19.12).⁴⁴ A man's house was to be the beginning, or rather a small component part of the city, contributing to the completeness of the whole city. The domestic peace contributed to peace of the city (*CG* 19.16).

no master. Then came parents, brothers, wife, children, kindred, relatives, and friends. Then there was the state itself as holding the place of a sort of parent. Also there were honours, praise. Last of all there was 'money' (wealth), which included all things of which man was the rightful owner, and which had the power to dispose by sale or donation (*FCW* 1.15.32).

42 A man, even a lonely savage, above all desired to be at peace with own body, fighting to pacify his mortal nature with its insatiable desires (*CG* 19.12) The peace of body was a duly ordered proportion of the bodily parts; the peace of irrational soul was a duly ordered repose of its desires, while the peace of rational soul was a duly ordered life and health of a living creature (*CG* 19.13).

43 Even in extreme case of men, separated themselves from others by crime, they could not succeed in their assaults unless they maintained a resemblance of peace among themselves (*CG* 19.12).

The earthy city, aiming at the earthly peace, limited the harmonious agreement of citizens concerning the giving and obeying of orders to the compromise between human wills about the things relevant to the mortal life (*CG* 19.17).⁴⁵ A society (commonwealth) of people was then an association of a multitude of rational beings united by a common agreement on the object of their love (*CG* 19.24).

Still, there were no true virtues in the earthly city.⁴⁶ There was no a true justice in the earthly city, where man was taken away from the true God (*CG* 19.21). Hence there was no a true commonwealth in Cicero's sense 'association of men united by a common sense of justice' in the earthly city (*CG* 19.21).

Earthly life was dominated by earthly desires irreconcilable with merely temporal relief through earthy peace.⁴⁷ In pursuit of earthly things not everyone, perhaps no one, achieved complete satisfaction (*CG* 18.2). Because of this general division of human society against itself, when the one part found itself the strongest it

44 A wise man commanded (and punished) members of his household, not 'because of a lust for domination, but from a dutiful concern for the interests of others, not with pride in taking precedence over others, but with compassion in taking care of others' (*CG* 19.14).

45 The peace between men was an ordered agreement among those who live together about giving and obeying orders (*CG* 19.13).

46 Prudence lay in distinguishing good from evil. But this was impossible for man in the midst of evil, or rather with evil in him, for even if prudence taught not to consent to the evil, and self control caused man not to consent, neither prudence nor self-control removed the evil from life (*CG* 19.4). Temperance was in a bridling the lust of the flesh to 'prevent their gaining the consent of the mind and dragging it in every kind of immorality', but it could not be achieved, when desired of the flesh opposed the spirit as in the earthly life with its never ending struggle against lust (*CG* 14.4). Justice was in assigning each his due, in creating in man himself a certain just order of nature, by which soul subordinated to God, and the body to the soul, which was impossible unless soul had God in mind and was subordinated to God, so that the desired of the flesh would not opposed the spirit (*CG* 19.4). Fortitude was in bearing with patient endurance the ills of life, but it merely bore a witness to the fact of human ills (*CG* 19.4).

47 The goods of this world caused the frustration to those enamoured of it, so the earthly city was divided against itself by litigation, by wars (*CG* 15.4).

oppressed another (*CG* 18.2).⁴⁸ Still, it was impossible to dominate permanently over the subdued; hence even the victorious were, at best, doomed to death (*CG* 15.4). Men desired to be at peace with their own people, while wishing to impose their will upon the people's lives (*CG* 19.12).⁴⁹ For every man would be in a quest for peace, even in waging war, whereas no one would be in quest for war when making peace (*CG* 19.12).⁵⁰

So, in its own human way, the goods desired by the earthly city made it better through its possession (*CG* 19.12). As long as men feared to lose temporal goods, they practised a kind of moderation in their use, and this held society together; thus the law did not punish the sin of loving these things, but the crime of taking them from others unjustly (*FCW* 1.15.32). If people were transformed to be lovers of the eternal things, then the temporal laws would not have power over them (*FCW* 1.15.33)

People alienated from God were wretched, yet even such people loved peace of its own (*CG* 19.26). Still, the citizens of the earthly city were born and vitiated by sin as 'vessels of wrath' (*CG* 15.2). The earthly city would not be everlasting, condemned to the final punishment (*CG* 15.4).

48 People submitted to oppression because, aside of the exceptional cases of men preferred death to slavery, at whole adhering to a voice of nature defeated people preferred subjugation to total destruction (*CG* 18.2).

49 For even when they waged war on others, their wish was to subject the others in order to impose own condition of peace (*CG* 19.12).

50 Even more so in a case of the fight for a more just cause, when the victory and the resulting peace were undoubtedly the goods to be desired and gifts of God (*CG* 15.4.)

There were, for Augustine, two cities, the earthly and heavenly, different and mutually opposed by the very principle of their existence (*CG* 14.4).⁵¹ The citizens of the heavenly city were brought forth by grace, setting nature free from sin, as ‘vessels of mercy’ (*CG* 15.3). In the heavenly city men lived by the standard of the spirit (of God) (*CG* 14.4). In it those, put in authority, and those, subject to them, served the one another in love - its rulers by their counsel, and its subjects by obedience (*CG* 14.28). In a heavenly city man’s only wisdom was in devotion, which rightly worshipped the true God and looked for its reward in the fellowship of the saints, not only holy men, but also holy angels (*CG* 14.28). All man’s use in the heavenly city was to be related to the enjoyment of the eternal peace (*CG* 19.14). The peace of the heavenly city was to be a perfectly ordered and perfectly harmonious fellowship in the enjoyment of God, and a mutual fellowship with God (*CG* 19.13).⁵²

3.3.1. Summary of Augustine on the Earthly City

After the Fall, the perversion of will, from the love of God to self-love, made it impossible to establish true justice or true peace on the earth. In men’s earthly life they inevitably loved the earthly things instead of divine things, so in a sense in the earthly life a self-love could not be abolished. Still, there were people, who by God’s

51 When these two cities started on their course through the succession of birth and death, the first to be born was a citizen of this world, and later appeared one, who was a pilgrim and stranger in the world, one belonging to the city of God (*CG* 15.1).

52 The peace of the whole universe was to be the tranquillity of order- and order was to be the arrangement of things equal and unequal in a pattern, assigning to each its proper position (*CG* 19.13). Peace between the mortal men and God was to be ordered obedience, in faith, in subjection to an everlasting law (*CG* 19.13).

grace elected to the heavenly life and lived a saintly earthly life. A true law of God, a true wisdom and justice and true love, could be found only in the heavenly city.

Nevertheless, the love for the earthly goods led to the earthly peace. As Dean noted, in Augustine's view, because people loved earthly things, the worldly laws could keep society together through fear of depriving them of these things. (Dean, 140). Augustine saw self-love as a law of the earthly nature. Not unlike the classical economics notion of 'invisible hand' (implying that the interplay of individual self-interests would bring about the general welfare), Augustine's assumption of the earthly self-love, implied that the individual inclinations to self-advantage would bring about the earthly peace.

The point of Augustine's contrast between the earthly and the heavenly cities was to contrast a worldly, temporal, justice and a true justice (Dean, 1963, 125).⁵³ However, Augustine's definition of society was given not in terms of justice, but in terms of love. The earthly society was a compromise, a concession to the self-love of each and all. In the earthly city, where self-love reigned, there could be no true justice. Thus to Augustine, in contrast to Ambrose, there could not be compromise of self-advantage and justice in this life.

Was then the earthly city without any justice? Was the Old Testament Law not a law of earthly life? Was it without true justice? Augustine was, then, self-

⁵³ Dean argued (in contrast to McIlwain, 1968, 155-6), that Augustine, writing some 40 years after the Edict of Thessalonica in 380, which established Christianity as the official religion of the Roman Empire, had no purpose to contrast the pagan and Christian state in relation to justice (Dean, 1963, 120-5).

contradictory in assuming that the Old Law, which was still in force, was a remainder of the original natural law.

3.4. Summary of Augustine

Augustine, like Paul, shared the Neoplatonic vision of the temporal life of the flesh as opposed to the eternal life of the Spirit. With the Fall, the will of man had become corrupted. As a result, man was no more in the intact state of nature. In this sense the human life was no more the natural one. It became a life of the pursuit of self-love, cut-off from the eternal heavenly life as a pursuit of love to God. Only by God's grace man could reacquire the true free will to move beyond a self-love.

Augustine's lasting contribution was to provide the conceptual foundation for the Pauline voluntarism through his doctrine of corruption of human will after the Fall. By the developing the notion of the will Augustine planted the germs of the future Scholastic clash of ideas of voluntarism and intellectualism. However, to Augustine, the notion of the will had its significance only in respect to man. It was left to the later medieval voluntarists to take a further step and to ask a question about the role of God's will in respect to His reason.

Augustine's *voluntarism* was more *intellectualized* (neoplatonized) than Paul's one. Augustine already asserted the image of God in reason. But it was not Irenaeus' solution of separation of earthly natural life (by reason in the image of God) from eternal life of salvation (by the likeness in the spirit). To Augustine, after the Fall the image of God in man's reason was disfigured, although, it was not lost completely.

Moreover, a true wisdom as a knowledge of the eternal and invisible things was beyond the depraved man unassisted by grace. The true image of God was then in the Neoplatonic contemplation (in the mind of man) of the eternal ideas (in the mind of God). To Augustine, moreover, God's image was more than a power of reason, it was also a power of will (to love). Augustine's meaning of the image in human reason, thus, overlapped with the meaning of the likeness in the spirit as connoting the good will. As a result, Augustine's notion of the will became entangled with a notion of reason even in respect to man.

Augustine, however, responded in his intellectualistic leaning not only to Neoplatonism. He also saw the image of God in human reason, as applied to the natural life. He was influenced by the Stoic concept of the sense-knowledge as self-awareness. But, to him, such self-awareness was foundation for the external temporal things knowledge (not lost after the Fall). It underlined his assessment of the rational self-sufficiency of the earthly life. Augustine saw the earthly life as corrupt, but not irrational. It was rational from the view of self-love (self-advantage). It had a rational goal to obtain the earthly peace, promoting self-love. It was self-sufficient, since a purpose of the earthly peace was achieved by the earthly means. Still, Augustine failed to reconcile himself to the earthly life, which rationality of self-love had nothing to do with the eternal wisdom of love of God.

Augustine's contradiction was, thus, in his assertion of a radical duality of the natural life after the Fall and the coming salvation in the spirit. Still, he could not deny completely natural life as far as it was flown from God's creation. So, on one hand, in the intact state of nature, as in the state of grace, man would have lived

merely by love for God. But, on another hand, God Himself created man and nature, striving to self-preservation, beginning in self-awareness, which manifested self-love. Augustine, as a result, was torn between the Neoplatonic contempt for life of flesh and the Stoic assertion of its naturalness, and, in a sense, its inevitability.

Augustine's vision of the earthly life as inherently corrupted was in a marked contrast with that of his teacher Ambrose. Ambrose attempted to build a new Christian foundation for law of nature as a law of the eternal self-preservation. Ambrose though dealt with natural law for the sages only. Ambrose's sage had perceived by reason that the promotion of the justice in the earthly life served to achievement of salvation and the eternal life. To Augustine, the earthly life and eternal salvation were set far apart. To Augustine, a true just life was impossible in the earthly city self-love. If we may adopt a twentieth century (and Russian) comparison, while Ambrose believed in military Communism, at least for a few (the Christian sages), Augustine believed that the New Economic Policy was here to stay until God's grace.⁵⁴

In summary, the roots of Augustine ambiguity towards natural law lay in his Neoplatonized voluntarism. To Ambrose, natural law was the eternal life of Spirit, which was the goal of the human existence, with the natural life of flesh being the merely the works of preparation. The place, given by Augustine to grace, had further diminished the significance of the observance of natural law on man's own account. His position became even more complicated, due to some confusion of

54 The disastrous experience of so 'Militant Communism' (1918-20) with its compulsory expropriation of 'the food excesses' from the peasants, and prohibition of private trade, resulted in spreading starvation, prompted Lenin to announce in 1921 'New Economical Policy' reviving small private enterprise.

voluntarism with the Neoplatonic intellectualism. The image of God was in man's reason, which, however, was disfigured. But it was not only in man's reason, but also in his will, which lost its innate love to God. So salvation, the whole purpose of man's life, became unattainable to man in his natural life (by his reason) aside of God's grace which would return righteousness to his will through man unhindered ability to contemplate the eternal ideas in God's mind.

The whole pathos of Augustine's position was in contrasting of the eternal life of the city of God with the earthly city life.⁵⁵ It showed how far the Christian thought moved from the Stoic vision of 'city of God', where men shared in God's reason. Augustine's Platonic antithesis between the eternal and temporal laws undermined the whole idea of natural law.

Still, to Augustine, the earthly life was to be natural as far as the law of nature was revealed in the Ten Commandments, and the Gospel commanded it. He himself asserted natural law as a law of conscience, innate in man and existed before the Fall, preceding the written Law of Moses and Gospel (given to command the law of nature more explicitly) (Dean, 86). Were then Ten Commandments not a law for the earthly life? Or were they not a part of the original natural law for the state of nature (where everybody was equal and there was no private property and, hence, theft)? Moreover, Augustine restated the naturalness of family and society to man from the creation. This acceptance of social nature of man led him to state that men were

⁵⁵ In the aftermath of the siege of Rome in 410, as Markus noted, society had been increasingly seen by Augustine from the historically -eschatological perspective of salvation, in contrast to the Classical cosmological perspective (Marcus, 1970, 97-98; 101). The contrast of the eternal and temporal life was sharpened in the times of the expectation of the decline of the Roman world which the early Christian, as the citizen of Roman Empire only had knowledge of.

held together by the bond of kinship; man was driven to enter into society and to make peace with men by nature (Carlyle, 1928, 1,125).⁵⁶

Augustine had attempted to reconcile the vision natural law as the Commandments with Pauline *anti-legalism*. It was not enough to know God's Commandment. While by his own will man could refuse to obey God, only by grace (!) could he truly fulfil the Commandments (from the love of God, not self-love). However, it was not enough for a rehabilitation of the Commandments to state that they were to be fulfilled internally in the will, not externally. The true question was about the use of the Commandments for salvation. Were the Commandments (by themselves) as the Law of earthly life of any use for (heavenly) salvation? And (as Paul's) Augustine's answer would be negative.

The only true law of nature was in the Gospel precept to love God and others, which was unattainable in the unnaturally deprived earthly life. In a sense, the whole notion of natural law as a law of the earthly life became meaningless. Augustine was self-contradictory in his vision of the Commandments as God's law and in his 'anti-vision' of absence any true justice in earthly life, which the Commandments supposed to be regulating. He was too much of the Pauline anti-legalistic voluntarist. To Augustine, like Paul, there could not be salvation outside the state of grace. Only by God's grace man could be transformed from love of self to love of God.

⁵⁶ Augustine practical teachings on Natural Law, in respect the natural equality of men and, then, slavery and government as remedies for Original Sin, were in the line with the other Christian Fathers (Carlyle 1928, 1,118). Though after the Fall conditions were seen by Augustine more as punishment than remedy.

4. Summary of the Church Fathers

The early Church Fathers - Irenaeus and Tertullian - produced a genuine synthesis of both Testaments and Stoicism. Irenaeus assimilated the Old Testament notion of man as 'living soul' in the *image* of God to Stoic vision of rational soul of man. The early Christian vision natural law was of the original law of nature as a law of common reason, obscured by the original sin, renewed in the Commandments, and ultimately perfected in the Gospel. Their idea of natural law depended upon their common vision of salvation as a prolonging of natural life (even if for Irenaeus the idea of natural law had Old Testament connotations, while for Tertullian it had Stoic ones). They *intellectualized* the Old Testament *legalistic voluntarism*. Though, while Irenaeus was more of *intellectualized legalistic voluntarist*, Tertullian was more 'straightforward' *legalistic intellectualist*. They prepared the ground as for Aquinas' *legalistic intellectualism* as well as for Scotus' and Ockham's *legalistic voluntarism*.

A very different approach to natural law was adopted by those later Fathers, more influenced by Paul's radical *anti-legalistic voluntarism*, with its antithesis of the natural and eternal life. Ambrose quite ingeniously tried to overcome this conflict by adopting the middle Stoic *intellectualistic* vision of natural law as interplay of inclinations to self-advantage and justice. Ambrose's solution was in the vision of natural life as overshadowed by concern for eternal life. This concern with eternal life became paramount in Augustine's neoplatonised *voluntarism* to such a degree that the temporal values of natural life were seen as hostile to the eternal values of salvation. Thus, with

Augustine, a complete turn in the Church Fathers' thought beckoned: from the assertion of natural life (and thus natural law) as a precondition to salvation to the full denial of it.

However, it was the early Christian Fathers' idea of natural law as common reason, expressed by God's Commandments, which became the prevailing medieval vision of natural law.

Chapter 5

Scholastic Natural Law

Introduction

The subject of the chapter is a clash of ideas within Scholastic natural law: a clash between *intellectualism*, championed by Aquinas, and *voluntarism*, brought forward against him by Scotus and Ockham. It will be argued that this Scholastic conflict was of a new kind. The earlier Patristic divide was between the *anti-legalism* of Paul and Augustine, who denied the relevance of earthly works for salvation, and the *legalism* of Irenaeus and Tertullian. The Scholastic natural law conflict, by contrast, was not a conflict between (*intellectualistic*) *legalism* and (*voluntaristic*) *anti-legalism*.¹ The *whole* medieval mentality was *legalistic*, in the sense of conforming with the early Christian Father's view of God's Commandments as natural law.² In particular, the Scholastics as a whole were legalists in as much as they also saw the natural law precepts as God's Commandments in respect to man's deeds. The Scholastic *intellectualists'* and *voluntarists'* respective task was to incorporate this *legalistic* vision into their conflicting understanding of the law of nature.

1 *Anti-legalism* was dead partly due to the Roman Law Christian inheritance. The Roman Law heritage had become an integral part of Western Christianity, with Roman Law used as means of Papal procedure as well as of representing Old Testament *legalism* (Ullmann, *Medieval Political Thought*, 20-21). These tendencies became even more apparent with the advance of Canon Law, which much indebted to the Roman Law usage. Naturally the both *intellectualists* and *voluntarists* relied upon the same Roman Law set of natural law definitions -the law of nature, the law of nations and civil law.

2 Gratian's description of the law of nature as contained in the Law and the Gospels (Decretum, d.1, intr.) gave the point of reference for the whole medieval tradition. This natural law definition was expanded by Rufinus in the line with the early Christian Fathers in his Commentary on Gratian's Decretum, part 1, distinction 1. Natural law, originally written in the heart, was all but lost in the first man, only to be restored in the Commandments, perfected in the Gospel, and adorned in customs. See Appendix 1 & 2

The Scholastic divide was, then, between a new *legalistic intellectualism* and a new *legalistic voluntarism*.

The Scholastic controversy was not, however, about the intellectualistic notion of natural law as right reason, or ‘evident knowledge’, as that was affirmed by both intellectualists and voluntarists, who both shared the early Christian legalistic-intellectualistic natural law inheritance. The controversy was, rather, over the premises and content of ‘evident knowledge’ - the scope of natural law.

To the intellectualist Aquinas, human reason itself was able to discover the whole of natural law, so the primary principles, as well as all its inferences, were part of ‘evident knowledge’. Aquinas’ task was to provide a new intellectualistic foundation for the early Christian Fathers’ legalistic account for natural law as an original law of human reason that was ‘reminded’ through the Commandments after the Fall. In spite of its acceptance of the legalistic Commandments as natural law, Aquinas’ intellectualism was still a demonstrative law of human reason. To the intellectualists, the intellect always took precedence over the will.

The crucial (ontological) issue at stake was a role of the will of God in His creation. In application to natural law the voluntarists-intellectualists’ divide on a role the divine will manifested in the (epistemological) question of the boundaries of human knowledge. If God’s will was free, as the voluntarists insisted, then the whole Aristotelian presumption of submergence the will in the intellect was to crumble. There was no God’s necessary intellectualistic design for His creation out there, which human reason should be ready to comprehend. To the voluntarists, the boundaries of ‘evident

knowledge', capable of being discerned by human reason, were ultimately defined by God's free will. As a result, and in contrast to the intellectualist Aquinas, human reason was to the voluntarist Scotus and Ockham (especially) confined to what was made known (by God) evidently in a new strict sense. This voluntarists' quest for the unquestionable criterion for the valid human knowledge went to the heart of Aquinas' concept of evident knowledge. To the voluntarists, a man was not to in position to make the exhaustive judgement about human nature, created by the free God's will, beyond what was made known by God either in the direct revelation or through the mediation of human reason. And, if, to Scotus, at least the Commandment to love God was necessary, to Ockham even it was dependent on God's will.³

This intellectualists-voluntarists' epistemological difference in respect of the scope of natural law was reflected in their judgements on the state of fallen human nature in contrast to intact nature.⁴ The natural human condition was determined by the original *dominium* as the original endowment of man in the image of God with power over the

3 On the surface Ockham's *voluntarism* had the two conflicting definitions of natural law: as a dictate of right reason and God's Command. However, Ockham attempted to overcome this conflict through the particular premises of 'evident knowledge': being ultimately God's dictate through the conventions of language (God assigned bad connotation to 'murder' in the language He chose to provide us with). The formal insufficiency of the definition of law, as merely dictate of right reason, was later noted by Suarez. To Suarez, obligations of the law were empty in the absence of the law-giver willing to command. It was another application of the dissolution of the ontological intellectualism. If God's will was not under control of His intellect, human will was not under a dictate of human reason, either. The obligation to follow natural law as right reason should be placed elsewhere. The voluntaristic natural law was to be ultimately a law of prescription as a law of God's bounding will.

4 The contradiction of the Roman Law intellectualistic understanding of the law of nature and the law of nations passed into the medieval thought (see Appendix 1). To Ulpian, a law of nature was a law of the original primitive condition (like common animal inclination to procreation) in contrast to the law of nations as a law of the civilised human conditions. Gaus did not distinguish the law of nature from the law of nations, which was to him a law of human reason. The seeds of the Roman Lawyers' conflicting views were in the Stoic unresolved contradictions. The notion of the law of nature had grown out of the Stoic contrast of nature and convention. It planted seeds for future unresolved tensions. The early Stoics saw the law of nature in right reason of the sage, as a law of rational nature. The eclectic later Stoics already saw it also in the natural inclination to self-preservation, which man shared with all animals. The matter did not become easy with the Christian Fathers. To them, the state of nature became a state of the innocence before the Fall. But they already saw the law of nature as God's Commandments, given man as created with reason in the image of God.

rest of creation. To the voluntarists Scotus and Ockham the scope of the original natural law was confined to intact human nature, when there were no private property or servitude, as dictated by the original *dominium*. So the change in human condition in respect to government and private property was a result of new divine ordination as a remedy for the original sin. The intellectualist Aquinas, in comparison, adhered to a wider notion of naturalness. To him, there was no radical change in human condition after the Fall. So government and private property were not against nature. By the Aristotelian means Aquinas sought to bridge the divide between the original primitive and the civilised human conditions.

The debate also could be seen through the attempts to integrate the two old visions natural law: as right reason, and as natural inclination. Aquinas and Scotus attempted to present the rival *intellectualistic* and *voluntaristic* versions of ‘natural inclination’ idea of natural law as pertaining to intellect and will, respectively. Aquinas advanced the doctrine of the natural inclinations as pertaining to the whole ladder of created things.⁵ Aquinas also attempted to bring together the two ideas of natural law: human reason and natural inclination. To him, human reason could discover what was naturally just. To the voluntarist Scotus, there was already a sharp divide between human will’s inclinations in the intact state of human nature and its fallen state. He assimilated Anselm’s idea of the state of innocence as the original union of the two (later opposed) inclinations of the will to justice and self-advantage. To Scotus, then, natural law was ‘the rules of higher justice’ discerning by right reason as God’s Commandments, given in order to moderate man’s natural inclination to self-advantage after the Fall. Ockham with his radical *voluntarism* refused to assign any ‘natural’ inclination to the will. Still,

to him, the inclinations to self-advantage and justice defined the scope of the feasible to right reason.

The principal contribution of this chapter may be seen in outlining the conflict within the Scholastic natural law between Aquinas' *legalistic intellectualism* and the *legalistic voluntarism* of Scotus and Ockham (in the place the older Patristic natural law divide between *legalism* and *anti-legalism*), including its application to the *intellectualists–voluntarists* interpretations of the early Christian *legalistic* inheritance (such as the compliance the Commandments to the original *dominium*). Aquinas' Aristotelian concept of the natural inclination diminished the possibility of the conflict between the natural law precepts for intact and fallen human nature. At the same time it did not fit well with the Early Christian notion of man alone receiving natural law (and the original *dominium*) in virtue of his reason in the image of God. By comparison, the voluntarists, preoccupied with the Fall, reasserted the sharp divide between the states of intact and corrupt human natures. As a result, they saw the original *dominium* as entirely non possessive, and, hence, down-played the significance of the Commandments as the original natural law. The voluntarists' focus on a relation of the original natural law and the original *dominium*, as well as Aquinas' vision of natural law as natural justice, contributed to the emergence of idea of natural rights.⁶ Thus another consequence of the Scholastic debates was the renewed interest in the Christian legalism through a new quest what would constitute obligation under the law.

⁵ This doctrine was later further developed by Vitoria.

⁶ On the genesis of the medieval development of notion of *dominium* as *ius* see Appendix 3.

The first section surveys Aquinas' new intellectualistic foundation for the early Christian Fathers' legalistic vision of natural law as the original law of reason reminded by the Commandments after the Fall, as well as a contradiction of this vision to the idea of natural inclination.

The second section deals with a development legalistic voluntarism respectively of Scotus and Ockham. The first subsection interprets Scotus' legalistic version of natural law as the Commandments, recognized by right reason, and imposed on the natural inclination of the will to self-advantage. The second subsection focuses on Ockham's radical voluntarism with its limited concept of natural law and the original *dominium*, and his contribution to the idea of natural right.

1. The Intellectualistic Natural Law of Aquinas

The subject of this section is Aquinas' somewhat contradictory attempts to integrate the early Christian legalism with Aristotelian intellectualism. More particularly, the focus will be on the incongruity of the legalistic view of the Commandments as natural law, as given to man in the image of God, with Aquinas' vision of natural inclination, as pertaining to the whole creation.

Aquinas was an heir to the early Christian Fathers in his account of natural law story. Man had innate natural law implanted in him as the *intellectualistic* law of reason, which was presented by the *legalistic* Commandments after the Fall, and was then perfected in the Gospel as a law of grace. Aquinas' contribution to intellectualism was

in his elaboration of the notion of ‘evident knowledge’, or right reason, supplemented by his notion of natural justice as discerning by reason. However, Aquinas’ attempt to assimilate this idea of natural law as right reason with the doctrine of ‘natural inclinations’ led to the inner contradictions in his intellectualistic natural law vision.

1.1. Aquinas’ Intellectualism: Superiority of Divine Intellect

St Thomas Aquinas (1225 – 1274) advanced the intellectualistic theory of natural law that reflected the burgeoning Aristotelianism of the 13th century.

Aquinas was an *intellectualist*, because, to him, the divine will was ultimately determined by the divine intellect (*Summa contra Gent.* 1.82; Harris, 1927, 1, 181). A law was, to him, not a command, but a rule and measure (*Summa Theologica (ST)* 1.2. 91.2).⁷ Divine knowledge was the necessary first cause of creation (1. 14.8, 13). To Aquinas, the whole community of the universe was governed by God’s mind (1.2. 91.1). The ruling ideas of things, existing in God’s mind, constituted eternal law. In respect to man also the act of intellect preceded every movement of the will (1. 82.4). Aquinas defined his intellectualistic natural law as a participation in God’s eternal law by the rational creatures (1.2. 91.2. con.1). Discerning natural law by his natural reason (as his endowment in God’s *image*) man could participate in eternal law.

Still, to a Christian thinker like Aquinas, man as a part of creation could not fully participate in the mind of God as a creator. To Aquinas, in contrast to the Stoics, man, being a part of creation, could not possess supernatural reason of God. It was only by

faith, not by human natural reason, that man could assert the truth of creation (1. 46.1). Thus, human reason was not sufficient for salvation and eternal life. For Aquinas, as for Augustine, wisdom was a supernatural knowledge by grace, aimed at things eternal, and was superior to science, which aimed at only temporal things. The higher [supernatural God's] reason was superior to the lower [natural human] reason (1. 79.9). Natural things lay midway between the divine and human knowledge; human science derived from them and they derived from God's own vision (1. 14.8.).

1.2. Image of God in Man's Natural Reason

Aquinas' distinction between natural human and supernatural divine reason was underlined by his concept of *image* and *likeness*. The likeness to God was achieved by supernatural reason through grace, while God's image as the natural endowment of man was in human reason.⁸

So the intelligent nature of man bore in itself the image of God (1. 93.3). God's image was of mind, while love of God was only possible through grace (1. 93.8.3). The image though could be perfected: from the natural knowledge of God to the supernatural knowledge by grace (1. 93.5). The image was a likeness in kind (1. 93.2). The likeness was a perfection of the image through grace. The likeness went beyond natural reason (1. 93.9.).

Like Irenaeus, Aquinas believed that the original sin did not corrupt human reason, and

⁷ The references in the text are to the *Summa Theologica*, if it is not noted otherwise.

so natural reason in God's image was still with man. Sin could not cause man to cease to be rational, since as irrational he would be no longer capable of sinning (1.2.85.2). As a result of the original sin the inclination to virtue lessened and original justice was withdrawn (1.2.85.1). Man could not fulfil the commandment to love God, as fulfilled by charity, by his pure natural endowment (1.2.109.4.con.3). By his natural endowment, without help of grace, man could not produce meritorious works proportionate to eternal life, though he could perform some actions of good connatural to man (1.2. 109.5) . Aquinas intellectualistic notion of supernatural knowledge through grace, which would bring the likeness as the perfection of the image, was akin to Augustine's neoplatonised voluntaristic notion of the will's transformation by grace from self-love to love of God (which also would bring the image of God in man to completion).⁹

1.3. Natural Law as Original Law of Reason revealed by Law

Aquinas followed the early Fathers in treating the revealed Law as a law of reason and, hence, as natural law. His contribution was to develop the concept of evident knowledge. Aquinas deviated from Irenaeus and Tertullian in his claim that the primary and general natural law precepts were not part of the revealed Commandments (1.2. 100.3).

The primary and non-demonstrable principle was a principle of non-contradiction - not to affirm and to exclude in the same time. The primary precept of practical reason

⁸ Aquinas' distinction between *image* in natural reason and *likeness*, as perfection of *image* through supernatural love of virtue, was possibly elaboration of Peter Lombard's (*Sentence* 2.16.3) distinction of *image* as knowledge of truth from *likeness* as love of virtue.

(directing to work) was that good should be pursued (1.2. 94.2).¹⁰ It itself was founded on the principle of the intelligibility (*ratio*) of good (ibid.).¹¹ The primary precept was ‘objectively self-evident’, since its predicate belonged to the intelligibility of its subject (ibid.).

The general precepts of the law of nature were self-evident to anyone who possessed natural reason, and had no need of promulgation (1.2. 100.4. con.1).¹² They served as

9 Aquinas though did not follow Augustine in his assertion that the original natural law was erased after the Fall and that man’s natural life, ruled by (natural) reason of self-love, had nothing to do with eternal life through grace.

10 The notion of practical reason, in contrast to theoretical, or speculative reason (or intellect), as the thinking reason that commands to pursue or to avoid an object, was originated by Aristotle (*Ethics*, 4.2, *On the Soul*, 12.10; Hans Kelsen, 1991, 90). The necessity of such notion was conditioned by the lack of independent notion of the will in Aristotle. The notion of the will played no independent role in Aquinas as well. Thus, practical reason was, to Aquinas, a rule of action. A precise meaning of Aquinas’ primary precept of practical reason might be open to various interpretations. German G. Grisez, claimed that Aquinas’ natural law precept was not imperative (Grisez, 1991, 191-225). Grisez’ point was that if Aquinas’ natural law precepts were not imperatives that Aquinas could not be charged with lack of the distinction between ‘is’ and ‘ought’ statements. Still, to Grisez, it was not a theoretical statement either (id., 214). In Grisez’ view it was rather ‘the imposition of tendency’, or first condition, for any purposeful act (id., 201-2). However, to Grisez, it was also not merely a theoretical reason involving decision (to act) (id., 217-8). To Grisez, the primary principle was a sort of direction for any action aimed at some end, without specific reference to its moral worth, as ‘rational direction insuring that action will be fruitful and that life will be as productive and satisfying as possible’ (id., 213). To Grisez, the practical reason directs all act moral and immoral alike (id., 210-2). Was, then, to Aquinas, immoral behaviour merely one of many possible manifestations of purposeful rationality or was it manifestation of the failure of human rationality? In Finnis, and Westerman after him, denied that unjust law were, to Aquinas, no law at all (Finnis, *Natural Law and Natural Rights*, 363-4; Westerman, *The Disintegration of Natural Law Theory*, 70). After all, they, too, were the products of free determination (Westerman, id.) Indeed, Aquinas’ general definition of law as a rule and measure did not have specific reference to the purpose of the rule. This wide definition was later criticized by Suarez (On Laws 1.1.1), exactly, because a law, so widely defined, would relate not only to moral matter, but also to ‘artificial’ matters (even if such ‘arts’ promoted evil). However, in respect to Aquinas’ natural law, as a participation in God’s eternal law, it would be hard to imagine that such participation could be directed to immoral ends. The immoral laws were, to Aquinas, ‘spoiled’ or ‘corrupt’ laws (1. 2. 95.2). They were in no ways the laws of human nature as it was conceived in God’s eternal laws.

11 Aquinas’ postulation of this primary precept as an objective to pursue good was a point of innovation (Grisez, 205-6).

12 Boler noted, Aquinas’ first principle, such as, Good should be pursued and evil avoided (ST 1.2.94.2), was a principle of non-contradiction, ‘more as a principle of inference [according to which a conclusion followed] than as a premise [from which conclusion followed]’ (Boler, 1998, 164, n.10, 166, n.19). As O’Connor noted, Aquinas saw a difference between the precepts ‘known through itself’ (*per se notum*) and precepts evident to us (*quoad nos*) (O’Connor, 1968, 65). Then the precept to pursue good and avoid evil could be seen as ‘known through itself’, while Commandment to love God – as evident to us (ibid.). Armstrong, by contrast, implied that precept self-evident in relation to us, such as ‘whole is greater than its parts’ (1. 2.94.2), meant to be understood through the meaning of the term (as ‘whole’) without reflection, while the [more complex] terms of the precepts self-evident in themselves were not necessary known to everyone, but once understood, the truth of the proposition would be grasped too (Armstrong,

the first principles, from which the precepts of the Decalogue were known by a little reflection (1.2. 100.3).¹³ One of these evident primary precepts was a precept that one should do evil to no one (1.2. 100.3). Aquinas also marked out the self-evident precepts, such as that one should love God, or one's neighbour, that constituted, in itself, the end of the precept, which did not need to be promulgated (1.2.100.11).¹⁴ By contrast, there were some other moral precepts that, although capable of being seen by the most ordinary intelligence, still needed to be promulgated, because a human judgement might be misled about them (1.2. 100.11). These were the precepts of the Decalogue (1.2.100.11). Yet, they were the absolute precepts in the sense that the natural reason of man might judge straightway as things to be done, or not to be done, such as; Honour thy father and thy mother, Thou shalt not kill, Thou shalt not steal (1.2.100.1). Still, in the case of the moral precepts, deduced as the conclusions from the general principles of natural law, the minds of many [might] lead astray (1.2. 99.2 con.2). Some natural law precepts, moreover, were not so evident to all, but only to the wise (1.2.100.11). They were judged by the wise in the light of more careful consideration (1.2.100.1). These were the moral precepts superadded to the Decalogue, such as ones defining the content of adultery (1.2.100.11).

All moral precepts of the Law as concerned with right conduct in conformity with natural reason belonged to the law of nature (1.2.100.1). The precepts of the Decalogue were immutable as so far as they embody justice in its essence, but as applied to particular acts - as, for example whether a particular act constituted homicide, theft or

1966, 35- 6).

¹³ Armstrong pointed out that while Aquinas distinguished two methods of deriving conclusions by *determination* and *demonstration*, only the later method was used by Aquinas in deriving the secondary precepts from the primary ones, like 'one should not kill' might be derived from the principle 'one should harm no man' (Armstrong, 1966, 134-5).

adultery or not - they admitted the change (1.2.100.8.con.3). The change occurred as an interpretation of the precept rather than a dispensation from it (1.2. 100.8.con.3).

To Aquinas, the necessity of the written Law arose out of the shrouding of the original natural law after the Fall. He did not, however, explain why man's natural knowledge of natural law should be obscured by the proliferation of sin. In his discussion of the image of God in man he did note that man now could not to love God by his natural endowment alone. The divine [or revealed] law provided for man's needs in matters in which man's reason might be prevented from its proper function (1.2. 99.2). The [Old] Law was particularly necessary for people at the time when natural law began to be obscured by reason of the proliferation of sin (ST 1.2. 98.6). By removing ignorance the Law was to establish harmonious relationships between man and man and between man, and God (which was summed up in the commandment, Thou shalt love thy neighbour as thyself for God's sake, i.e. whatsoever you would not wish that others would do to you would not do to them) (1.2. 99.1.con.2-3; 32-35).

Like the early Christian Fathers, Aquinas saw the Old Law as an intermediary between the law of nature and Christ's new law of grace, so that men were led to 'the perfect' by means of the less perfect (1.2. 98.6). It was also right that man should first be left to himself under the Old Law in order that by falling into sin and becoming conscious of his own weakness he recognised his need for grace and for the New Law (1.2. 106.3). Aquinas referred to Lombard's comparison (3 *Sent.*40) of the Old and New Law as restraining respectively the hand and the mind (1.2. 107.1. con.2).

14 However 1st and 2nd Commandments still required the infused faith.

The moral precepts had to remain in the new law, because they were intrinsically implied in virtuous action (1.2. 108.3).¹⁵ The new law was a fulfilment of the Old Law by supplying what was missing in the Old Law (1.2. 107.2, 28-29). In his teaching Christ fulfilled the precepts in three ways (1.2. 107.2, 30-31). First, he did it by declaring its true meaning, secondly, by prescribing more strict observance, thirdly, by adding some further counsels of perfection (ibid.). In comparison with natural law, being the original part of the human nature, the new law, being added on to nature by the gift of grace, did not only pointed out to man what he should do, but assisted man actually to do it (1.2. 106.1.con.2).

The main innovation of Aquinas' in comparison with the early Christian Fathers, in respect of the concept of natural law as 'evident knowledge', lay in his first (primary) principle of practical reason as directing man to do good as an end, prior to any specific Commandments. But was natural law to direct man to his good through his natural inclinations? Or was goodness in question related to act in accord with right reason? Was a dictate of right reason sufficient to enforce natural law? To the early Christian Fathers, in virtue of man's reason in God's image, man was capable of the knowledge of good and evil and, as a result, of obeying the Commandments. Though, they did not explicitly distinguish a free will of man from a free power of the choice.

1.4. Aquinas' Natural Law: between Law of Reason and Natural Inclination

Through Isidore's *Etymology* and Gratian's *Decretum* the medieval tradition inherited

¹⁵ The juridical precepts were left to man's decision (1.2. 108.3). The ceremonial precepts were abolished (1.2. 108.3.con.3). The Commandment about Sabbath also was not part of natural law (1.2.100.8.5).

the two conflicting Roman Law opinions on the distinction between the law of nature and the law of nations, as well as on naturalness of property and subjection man to man. (See Appendix 1). To Ulpian, natural law was a 'law' of natural inclinations common to all animals, such as procreation and care for offspring.¹⁶ So to him private property and slavery were against nature. He distinguished the law of nature, as a law of the original primitive condition, from the law of nations, which was confined to human society with government and private property. Gaius made no distinction between the law of nature and the law of nations as a law of human reason. Gaius' law of nations was a law of reason, confined to mankind, and, hence, confined to civilised conditions. To Gaius property arose naturally, inoffensively, from a taking of possession of something which belonged to nobody, with no injury done to others. Slavery, going back to the captivity in the war, was also not against nature, but only in the sense of naturalness (of war) of self-defence. Still, captivity itself was not voluntary, but a punishment. So Gaius, just as Ulpian, assumed that originally all men were naturally equal.

The Christian Fathers assimilated Roman Law - the Stoic heritage- with the Old Testament story of Genesis. The state of nature became the original state of innocence. In virtue of his reason (in the image of God) man possessed the original knowledge of natural law. However, the Fall obscured this knowledge, and the written law was given as a 'reminder'.

To Aquinas, likewise, the Decalogue and the other moral precepts of the Old Law were given as 'a reminder' of natural law due to the effect of the original sin upon man. So, the Law precepts were related to the civilised conditions of private property and

¹⁶ Ulpian possibly was influenced by Aristotelianism. However, similar views could be found among the Stoics, like Chrysippus and Panaetius, who insisted on the natural inclination to self-preservation.

marriage. Was then natural law not a law of the state of nature?

To overcome those contradictions of the early Christian vision of natural law, Aquinas attempted to synthesise the early Christian Fathers notion of natural law as common reason, expressed in Old Testament Commandments, with Ulpian' and Gaus' natural law definitions preserved by the Cannon Law.¹⁷

Aquinas, moreover, was not, like the early Christian Fathers, rooted exclusively in the Old Testament and Stoic traditions. He was also an Aristotelian thinker. So Aquinas, as Gilby pointed out, defined natural law not only through the meaning of 'rational ordinance', but also through 'its meaning lying in its purpose'.¹⁸

Still, the rational character of law was a corner stone of Aquinas' natural law. Law as such belonged to reason (1.2. 90.1). Only rational creatures, sharing in eternal reason, had natural law in a sense of perceiving its meaning; a non-rational creature could not be referred as keeping it except by a figure of speech (1.2.91.2.con.3). Nevertheless, to Aquinas, as a reflection of his Aristotelianism, the 'order' of the precepts of natural law (*lex naturalis*) corresponded to man's natural inclinations (1.2.94.2).

According to the 'first order' of natural law precepts, in common with all substances, there was in an inclination towards the good of the thing's nature, as to preserve its own natural being, hence, preservation of human life pertained to natural law (ibid.).

Besides, even the early Stoic notion of the law of nature was marked by the Cynic vision of the opposition of nature and human convention.

¹⁷ Tierney paid attention to the Pope Innocent IV's assimilation of the Roman Law explanation of private property from the first occupation, with the scriptural rule, do as we would be done by (Tierney, 1997, *Idea of Natural Right*, 143-4).

According to the ‘second order’ of natural law precepts, in common with other animals, there were in man natural inclinations, such as the union of male and female, bringing up of the young, and so forth (ibid.). Aquinas’ ‘second order’ of the precepts of natural law (*lex naturalis*) (ST 1.2.94.2) exactly corresponded to his ‘first sense’ of natural law (*ius naturale*) (ST 2.2. 57.3).¹⁹ natural law (*ius naturale*) in the first sense was common to man and other animals; it was the one of mating of male with female to generate offspring and of care for their young ones (ST 2.2. 57.3). Incongruously, the ‘first sense’ of natural law (or the ‘second order’ of its precepts), as common for all animals, in which Aquinas followed Ulpian, was not natural law according with Aquinas intellectualistic definition of it as pertaining to rational nature only.²⁰

The only natural law according to his intellectualistic definition was the ‘third order’ of the precepts of natural law (*lex naturalis*). It was already proper to man’s rational nature, such as to know the truth about God and about living in society, such as, that man should shun ignorance, or should not offend others with whom he ought to live in

18 Gilby, 1958, 135.

19 In dealing with subject of natural law Aquinas used *lex* (law) and *ius* (right) interchangeably, probably because the Roman and (later) Canon lawyer used *ius* in the sense of law, and commonly referred to the law of nature as *ius naturale*, and to Law of Nations as *ius gentium*. Gilby pointed out, that Aquinas held *lex* to be the rational expression of *ius* (Gilby, 1958, 121).

20 Armstrong attempted to argue that natural necessity seemingly implied by Aquinas’s concept of *naturalis inclinatio* should be understood ‘analogically’ (Armstrong, 1966, 44). In his view the natural inclinations provided the foundation and the direction for our knowledge of self-evident principles of natural law (id., 47). To Armstrong, recognition of natural inclination was indispensable for the knowledge of ‘the term, not known to everyone, but known in itself’ (id., 48). O’Connor, likewise, argued that since the natural inclinations were supposed to be apprehended by reason as being good, there was no inconsistency in Aquinas’ defining natural law as law of reason, as well as a law corresponding to the natural inclinations (O’Connor, 1968, 72). However, the interpretation of natural law as ‘natural inclination’ precluded its interpretation as a law of reason, as Suarez later argued. Being ‘natural inclination’ it should involve necessity, not deliberation. Moreover, if the natural law precept might be known immediately from its terms, there would be no point in ‘bringing-in’ any other knowledge, as one of natural inclinations. Besides, why, then, to Aquinas a law, as such, pertained only to the rational creature, while the natural inclination pertained to the irrational part of the creation as well. As even a

civility (1.2.94.2). This ‘third order’ of the precepts of natural law coincided with the ‘second sense’ of natural law. [Natural] law (*ius naturale*) in the ‘second sense’ too prescribed that, which was natural to man by his reason (2.2.57.3). It was Gaus-Ulpian’s law of nations. Aquinas’ innovation was in a reinterpretation of Ulpian’s law of nations, being particular to human conditions, to coincide with Gaius’ definition of it as a law of natural reason.²¹

Aquinas, besides, defined the law of nations (*ius gentinum*) as an application of natural reason to conditions of human society. It was through looking at the thing as matching with another, not absolutely or in the abstract, but from the point of consequence (2.2.57.3). Thus, in a case of the ownership of property, considered in itself, there was no reason why this meadow should belong to this man rather to that man, but when taken into account its being under cultivation, then [in consequence] it tallied with being owned by this not that man (2.2.57.3). Aquinas elaborated the explanation of the natural origin of property from expediency, due to advantageous consequence of it. It was expedient for man’s life to possess thing of his own, because it was more according to self-interest as well as common advantage of efficiency and peace (2.2. 64). Man was naturally inclined to have his own things; he voluntarily laboured hard and prudently for himself.²² Aquinas thus did not regard private property as against of natural law. Private property was not contrary to natural law but an addition to it (2.2. 66.2). Likewise, from the bare nature of the case there was no reason for this man rather than that man being a

supporter of natural law of ‘natural inclination’ Vitoria later conceded, the human ordinance had nothing in common with the animals’ practice.

21 To Aquinas man was naturally inclined to live in society. To Aristotle political society emerged from the association of villages (which, in their own turn, grew from the extended family) (*Politics* I ii 1252a24-1253a39). So, as an Aristotelian, Aquinas could not confined Natural Law to primitive conditions of Ulpian’s Law of Nature.

22 Such a view related to Aristotle (*Politics* II v 1263a21-1263a30, 1263a40-1263b15).

slave. Still, servitude, too, as a part of the law of nations, was natural in the sense of expediency (2.2. 57.3). Aquinas' insight, that man's natural inclination to his own good promoted efficiency and peace, seemed to be rather at odds with his insistence of usefulness of forced labour for a society. Servitude was 'expedient', though, from the Aristotelian view of some men as natural slaves, who were used as merely 'tools' (*Politics* I iv 1253b23-1254a17, I v 1254a17-1255a3).

Apart from seeing the law of nations as a law of consequence or expediency, Aquinas also saw it as a law of natural equity, or justice. Matters of the law of nations were dictated by natural reason as being closely bound up with equity (2.2.57.3.con.2). Natural law (*ius naturale*) then had the meaning of what was just from the very nature of the case according to equity, as when somebody gave so much in order to receive as much in return (2.2. 57.2).²³ A thing, which was in itself contrary to natural law could not be made just by human will; so it could not become permissible to steal or commit adultery (2.2. 57.2). Namely, in this sense of natural justice the Commandments against stealing and alike were evident to natural reason. Aquinas, thus, again resorted to the view of natural law as a law of reason.

In summary, Aquinas attempted to Aristotelianize the early Christian Father's natural law through the Roman Law means. By joining together the two conflicting definitions of Gaus and Ulpian Aquinas introduced the two senses of natural law, which respectively covered the both natural law (*ius naturale*) and the law of nations (*ius gentinum*). In its wider meaning natural law included Ulpian's definition of the law of

23 Gilby pointed out the relation of Aquinas' discussion of natural justice to Ulpian's definition of justice, as the lasting and unwavering will rendering each man his due (*perpetua et constans voluntas ius suum unique tribuendi*) (Gilby, 1958 123).

nations as Gaius' law of human reason, as well as Ulpian's definition of natural law as a law of natural inclinations.²⁴ Aquinas' adoption of vision of natural law as natural inclinations, though, contradicted his own definition of law as pertaining to rational nature only. However, this vision of natural inclinations had an advantage of the integrating of the mechanism of its own fulfilment into the body natural law.

To Aquinas, like to Gaius, the law of nations was essentially a part of natural law. Aquinas, thus, differed from Ulpian in the scope, assigned to natural law. He effectively played down the differences between the original state of intact nature and the civilised state of fallen nature. Aquinas considered the origin of both private property and slavery as being natural. He offered an 'expediency' explanation of the origin of property, and assumed that the same expediency explanation applied to servitude. Hence, private property arose because of its advantageous consequences. Such 'expediency' explanation was different from Gaius' vision of private property, as arising from the first occupation, without infringing anybody's possession. To Gaius, private property emerged 'naturally' in the sense of not being opposed by anyone, hence, being just (apart of being efficient). To the Roman Lawyers, however, there was another story in respect to slavery, which 'naturally' occurred only as punishment for an attack on life of others, being rather an example of punishment.

Aquinas' another definition of the law of nations (which was to him part of natural law) as a law of natural equity (justice), essentially, coincided with his definition of natural

²⁴ In any case, Aquinas had a more embracing criterion of 'naturalness' than Ulpian. He claimed that since man was by nature a social animal, the law of nations was a conclusion from the premises of natural law, reflecting man's sociability, like those demanding justice in buying and selling (1.2. 95.4). Still, on some occasion Aquinas used a definition of (the second order of) natural law (*lege naturali*) as a law common to all animal in contrast to the law of nations (*jus gentium*) (1.2. 95.4. con.).

law as ‘evident knowledge’, and was corresponding to his fundamental view of natural law as a law of reason. This natural justice idea influenced the subsequent development the notion of natural right as man’s original *dominium* by the ‘right’ of man being with reason in the image of God. This vision of natural law as natural equity was rather at odds with his ‘expediency’ explanation of slavery.

1.5. Aquinas’ Natural *Dominium* of Subjection

The question of the scope of natural law related to the question of the content of the original *dominium* as reflected the original condition of man in the state of Innocence. To Aquinas, like the early Christian Fathers, man had the original natural *dominium* over non rational part of creation by a virtue of his reason in the image of God (2.2. 64.1; 66.1).²⁵ Moreover, *dominium* over the rest of the creation tacitly implied man’s *dominium* over himself.²⁶ This Aquinas –early Christian vision rooted in Stoic presumption of natural equality of man, which was in conflict with the Aristotelian view of some men as natural slaves.²⁷

Aquinas, thus, tried to reconcile the Fathers’ Stoic view, that originally all men were

25 *Dominium* over the very nature of external things belonged to God along. (2.2. 66.1) God ordered certain things for men’s material support in so far as imperfect things are for the sake of more perfect. This was why it was natural for man to have *dominium* over things as a power to use them being a creature of the reason in the image of God. (2.2.66.1). God too had ordained the conservation of the life of plants and animals, not for their own sake, but for the sake of man (2.2.64.1) Brute animals and plants did not have rational capacity [!] to decide their own lives; they were rather driven by instincts, as if from outside. as a sign of their natural servility and subjection to the purpose of others (ibid.). He who killed another’s ox committed sin, not by killing the ox, but by the infliction of proprietary loss on another (2.2. 64.1).

26 Such vision was later developed by Vitoria.

27 The Fathers shared the Stoic presumptions of the natural equality of men, and the naturalness of society. The first presumption was in contrast to Aristotle’s opinion that some men were slaves by nature. The second one was in accord with Aristotle, but in contrast with the Sceptic explanation of society from self-advantage. The Stoic notion of naturalness resulted in the lasting ambiguity towards any social contact explanation of society.

free and equal, with his explanation of servitude out of expediency, as well as with Aristotle's more general view that some men were not able to rule themselves. His solution was to attempt to prove that it was to men's own advantage to subject themselves to the wise, centred on the case of wife's voluntary subjection to the husband.

Aquinas introduced two respective meanings of *dominium*. One underlined the contrast of mastery over oneself with slavery. Another denoted any subjection in general, as in a case of man directing free men (1. 96.4). Aquinas conceded, that men were in a sense naturally free (masters over themselves) (2.2. 64.5). Naturally everyone valued his own good; servitude was punitive to those subjected to it, and hence there could not be such *dominium* in the original state (1. 96.4). Thus, involuntary servitude was unnatural. In contrast to a free man, the slave was used for the master's benefits. Nevertheless, there was the natural subjection of man to man. One reason was in the natural inborn inequality of human beings in bodily endowment or sex (1. 96.3). *Dominium* over free man, as directing him to his own or common good, existed in the state of nature for two reasons. Firstly, to live in society, men needed an authority to look after the common good, since if left to themselves men had a variety of interests. Secondly, if one man surpassed others in knowledge and justice his rule would be of benefit to others (1. 96.4). So natural domestic or civil subjection was for men's own advantage, as when men governed by those who were wiser, in this sense, woman was naturally subject to man (1. 92.2.con.2).

Hence, Aquinas believed that there was a natural subjection of inferior men to the wise man for their own benefit (!). In support of this claim he gave example of the wife. The

condition of wife in respect to husband, however, differed from condition of man in society. Aquinas himself kept Aristotelian distinction between pure political justice in respect of men in society and lesser domestic and paternal justice (Ethics, 6. 1134a32-b18). So, domestic relations lacked the full character of justice (2.2. 57.4). Even in the case of the wife, moreover, there were two sides to consider. Firstly, in respect to the original *dominium* of woman: was her *dominium* inferior to man?²⁸ Secondly, in respect of place of wife in the family, was it entirely of the domestic law? The wife, though being a ‘part’ of her husband, was however more distinct from him than children were - she entered into society, as the social life of marriage (2.2. 57.4).²⁹ Aquinas himself claimed, that any human being was an object of justice (2.2. 57.4). Still, marriage indeed involved something close to natural subjection for wife and mother as far as she could not stop being mother of her children or wife of her husband (the same was in a sense true for the husband and father who too could not cease to be father or husband). The case of man subjected to the wise man was different. There was no self-advantage in renouncing a full *dominium* over oneself. What Aquinas really had in mind was not self-advantage, but common advantage. To him, as to an Aristotelian, the weak should be ruled by the wise because of common advantage (in analogy with body ruled by mind).

Aquinas’ interpretation of naturalness went far beyond the Roman Lawyers, Stoics or Fathers. Aquinas was a hostage to Aristotle’s vision of society as being natural as far as man was predestined to live in society. He reinterpreted Ulpian’s vision of natural law as natural inclinations from the view of telos of natural body of society. So men, as the

²⁸ Ockham later denied that original *dominium* was given exclusively to Adam.

²⁹ Gilby noted that Aquinas, following Gregory IX ‘*consensus facit nuptias*’, already understood marriage as coming into being, by voluntary agreement, to be wife and husband (Gilby, 1958, 45).

parts of the body of society were naturally subjected to the whole. Hence, subjection was natural.

Aquinas' controversial assertion of the naturalness of subjection was rooted in the contradictions of the Aristotelian vision of naturalness itself. Firstly, Aristotle (like the Stoics) believed that man was by nature made for the company of others. In comparison with other animals, man, was provided with reason (instead of bodily strength), a capacity for knowledge and speech; companionship of his fellow was naturally necessary to man (On Princely Government 1.1).³⁰ Secondly, Aristotle had a 'natural purpose' explanation of society as a natural extension of the family (Commentary on Politics (CP) 25, 28, 29, 32). It implied the vision of society as a natural body. Thirdly, Aristotle (like the Sceptics) held the expediency, or self-sufficiency, explanation of society. The common life was beneficial, since one would come to the aid of another to sustain his life (CP 387). So, a city was originally made up for sake of sufficient living of several villages (CP 31).

The 'expediency' explanation was, in a sense, a sort of the social contract explanation of society. In such a political society men were equal in respect of justice and law. Political rule (of the city) was over free men and equals, according to which now some people and now others were called upon to rule (CP 374). With respect to the difference of rank between men as members of a civil society only such political rule had the full meaning of justice with some nuances according to their various offices (ST 2.2. 57. 4). However, this 'self-advantage' explanation of society did not mix well with the 'natural

30 Aquinas expanded the Aristotelian version of origin of society, in *Commentary on the Politics*, 309-310.

inclination' explanation of society, which was once adopted by the Stoics against the Sceptics' explanation of society out of expediency. It was even more at odds with the 'inner purpose' explanation of society. These difficulties haunted the later Thomists.

1.6. Summary of Aquinas

Aquinas' *intellectualistic* reformation of the early Christian Fathers' natural law was flawed because of contradiction between his ideas of natural law as 'natural inclination' and natural law as human reason.

Aquinas attempted to escape the early Fathers' incongruous *legalism* as a vision of the whole of Commandments in accord with natural law, which was at odds with their view of the state of nature as a primitive human condition lacking private property or subjection. Thus, Aquinas did not see private property, or servitude, as against natural law, but merely as a remedy for sin. In blurring the distinction between the states of primitive (intact) and civilised (fallen) condition Aquinas went far beyond the Christian Fathers. To him, natural subjection was a part of the original condition. In this he half-sided with Gaius, conceding that society and private property were 'rational additions' to natural law due to man's possession of reason lacked by beasts. But his logic was of the Aristotelian 'expediency'. The failure of Aquinas' Aristotelian vision of natural inclination was especially apparent in his treatment of political subjection. The Aristotelian assumption of dominance of 'natural inclination' towards common advantage at expense of the mastery over oneself went against the Christian Fathers Stoic assumption of natural equality of men. It went against Aquinas' (and the early Christian Fathers') notion of the original *dominium* as mastery over oneself and against

his vision of natural law as a law of natural justice. It went against his fundamental *intellectualistic* definition of natural law as a law of human reason according to which man should treat others as he wish to be treated himself.³¹ This vision, however, resolved the question of the source of the enforcement of natural law. Natural law was enforced by itself through the natural inclination of human nature.

Contrary to his own *legalistic-intellectualistic* vision of natural law as a law of the original human reason, restated in God's Commandments vision Aquinas attempted to construct the Aristotelian version of natural law as natural inclinations, pertained to the things according to their respective purposes. So there was a hierarchy rather than a competition or conflict of inclinations. This was not natural law in the middle Stoic sense of the two opposing inclinations to self-advantage and justice. From such an Aristotelian point of view the whole early Christian idea of man made in the *image* of God in his reason, and thus with a power (*dominium*) over himself as a prerequisite for moral self-government, was of no use.

Still, his *legalistic-intellectualistic* vision of natural law, discerned by natural reason as 'evident knowledge', which was also revealed in God's Commandments, was his lasting contribution to the idea of natural law. The downside of Aquinas' intellectualistic concept of natural law as right reason was in the underlined meaning of the law as a rule of action. Such meaning left unexplained a role of the will under the law of reason, in particular the source of the obligation under natural law.

31 Hooker later developed the *intellectualistic* explanation of the principle of natural equality on the basis of Aquinas' division of things into just in themselves and just in relation to others.

2. Fourteenth Century Voluntaristic Natural Law

The focus of this section will be on the new *voluntaristic* interpretation of *legalism* by Scotus and Ockham.

The *voluntarism* of the 14th century was a reaction to the Aristotelian *intellectualism*.³²

A new *voluntarism* of Scotus and Ockham attempted to combat the spread of *intellectualism*, such as Thomism, by reinstating the priority of will over the intellect.

To Scotus and Ockham, God's will was free, and was not determined by His intellect.

Reason did not dictate to the will what to will. Scotus and Ockham adopted the intellectualist definition of natural law as right reason only to state its ultimate dependence on God's free will. For the voluntarists true rationality meant free will.

Self-determination was in the will and the interplay of the inclinations of the will. To

Scotus, there were natural God's given inclinations of the will to self-advantage and to

justice. He, thus, used the middle Stoic idea of human nature ruled by the natural

inclinations to justice and self-advantage but placed them in the will. To Scotus, right

reason as natural law manifested the rules of justice which man received from a 'higher

will'. To Ockham, there were no 'natural' inclinations, which could be assigned to the

will. Natural law, though, still in right reason ultimately depended upon God's

Commandments. But there could be no God's undertaking to promote creatures' advantage

as far as God was a debtor to no one.

32 The spread of Aristotelianism from the middle of the thirteen century, particularly in the Arts Faculty of the University of Paris with its Greco-Arabian determinism, was perceived as a latent threat to the Christian faith. This perception led to the anti - Aristotelian condemnations of 1270 and 1277, and the subsequent reaction, aimed at reaffirming free will of God and contingency of creation, as well as to limit the scope of natural knowledge in relation to faith (Leff , 1976, 26-9).

2.1. Scotus and New Legalist Voluntarism: God's Commandments as Rules of Justice for moderation of Self-Advantage

The focus of this subsection will be on Scotus' innovative integration of *legalism* and *voluntarism* in his natural law theory. It will be argued that to Scotus' natural law was God's legalistic Ten Commandments, as innate 'inclination for justice', or right reason, given to man after the Fall until grace would come, when the only precept to love God would be necessary.

John Duns Scotus (1265-1308), a Franciscan, took upon himself the task of addressing the points of contentions between his order and the Thomist Dominicans. In Leff's words Scotus truly stood at the parting of the ways - 'from the Old Way to Ockham's New Way' (Leff, 1976, 35).

The main *voluntarists'* contention concerned the question of God's free will in His Creation. If God's will was determined by His intellect, as Aquinas implied, then, in a sense, the whole role of God in creation was no more than 'the first mover'. To voluntarist Scotus, in contrast, God's will was free and under no dictate from His intellect. Scotus attacked the Thomist determinism of God's will by God's intellect, with its presumption of necessity in the first cause. To him, already the whole of the created universe was in a sense contingent, for its existence dependent solely on God's will (*Op.Ox.* d.39.q.unica.n.22; Harris, 1927, 1, 184). Scotus upheld God's omnipotence by denying that any reason whatsoever could be assigned to the divine choice (*Op.Ox.* 1.d.8.q.5.nn. 23-4; Harris, 1927, 2, 181). Still God was bounded by the law of contradiction, since contradiction was impossibility, and God could not do the

impossible (*Op.Ox.4.d.1.q.1.n.26*; Harris, 1927, 1, 181, n.1).³³

2.1.1. A Predecessor of Scotus' Voluntarism: Anselm and the Natural Inclinations of the Will to Self-Advantage and Justice

Early medieval *voluntarism*, like that of Anselm, was Augustinian in its focus upon the inclination, or intention, of the will as the sole criterion of good and evil. ³⁴*This Augustinian anti-legalistic* emphasis on intention, rather than works under the Law, undermined the early Christian *legalistic* idea of natural law as the Old Testament Commandments. According to Augustine's Pauline anti-legalism, inward righteousness wasn't achieved by outwards works under the Commandments. Moreover, inward righteousness was only by God's grace. Paul and Augustine's anti-legalism was rooted in their preoccupation with eternal salvation at expense of fallen man's natural life. Still the eventual significance of the Augustinian *voluntarism* was in its emphasis on the will, aside of reason, which prepared the way to the post -Thomist *legalistic voluntarism*, with its new emphasis on free will of God.

St Anselm of Canterbury (1033 – 1109) was renowned for his proof of God's existence. But his other lasting contribution lay in a revival of the Augustinian voluntarism. Anselm's innovation was in applying the Augustinian emphasis on the will to the middle Stoics' (and Cicero's) vision of the natural inclinations to self-advantage and justice. The particularity of Anselm's voluntarism was that although the natural

33 Anything self-contradictory was impossible, and it was no limitation on God's freedom that He couldn't do the impossible.

34 The idea of the primary role of intention was reflected, for example, in Abelard's famous assertion that adultery was not adultery if the man in question wished the women to be unmarried (and had not committed adultery for the sake of it).

inclinations to self-advantage and justice were situated in the will, the free choice of will was dependent on human rationality.

The inclination for justice was given to the will alongside the inclination to advantage in order to temper the latter and prevent it doing what it ought not to do (*De Cause Diaboli* (DCD) 14). To Anselm, if there was merely an inclination to justice (without an inclination to happiness), then man would not be able to have the free choice of upright will (DCD 14). Anselm's free power of choice was an ability to keep justice of the will for its own sake (*De Libertate Arbitrii, Freedom of the Choice* (FC), 13). It was a God given power of choosing and doing according to justice. Anselm distinguished the will's free choice of justice, and free choice to reject it (FC 14). The true free will was in a free choice to keep justice. Still, if before the Fall man was supposed to will justice for justice sake irrespective of advantage, what was the purpose of the inclination for advantage given by nature? The inclination towards justice became separated from the inclination towards advantage as a result of the Fall (*De Concordia* 3.13).³⁵ In his sinful free choice, man, instead of using his freedom, chose to give it up (Gilson, 1955, 138). So man chose not to follow the inclination for justice for its own sake.³⁶ Still, man's original uprightness could be recovered by grace (FC 14).

In his distinction between the original condition (with true free will) and the state of depraved nature (with free choice), Anselm was a follower of Augustinian

35 Interestingly, Ulpian's understanding of law of nature as natural inclinations in a sense helped the *voluntarist* understanding of the state of Innocence as the state of the original inclinations of human will to keep justice (follow God's will).

36 In Adams' view, although justice was to be upheld for its own sake, it was hardly possible for man with 'full knowledge' (Adams, 1999, 251-2). Man with full knowledge, knowing that God would punish sin, would only choose justice to the extent permitted by natural necessity; moreover it would be unreasonable to choose justice for its own sake (id., 252). So man would never chose justice for its own sake. Adams though did not draw distinction between the original free will as a free choice to keep justice, which was lost, and the free choice of will after the Fall.

voluntarism with its account for wrongdoing as will's deficiency. He was also an Augustinian in his vision of human existence as based upon self-love (self-advantage) after the Fall. In contrast, in to the state of innocence, just as in the state of grace, man would go beyond self-love and embrace the true love of justice. Anselm, nevertheless, implied, against Augustine, that self-love was natural. He resorted to the middle Stoic vision of human life originally governed by the two inclinations to self-advantage and justice. To him, the purpose of the inclination for justice to moderate the inclination for advantage. Still, he claimed, with Augustine, that the true free will would chose justice for its own sake irrespective of advantage! As Augustine, he was a hostage to the contradictory vision of creation, as aimed on self-preservation but not self-love.

By bringing the middle Stoic intellectualistic view of natural law as trade-off between self-advantage and justice into the Augustinian voluntarism, Anselm, consciously or not, opened the way to the eventual integration of the Augustinian voluntarism with the legalistic view of natural law as God's Commandments. The Commandments could be seen as rules of justice within which man was free to pursue self-advantage, given to man after the Fall and in force until the return of true righteousness by grace.

2.1.2. Scotus' Rules of Justice as God's Commandments

Scotus transformed Anselm's Augustinian *anti-legalistic voluntarism* into a new *legalistic voluntarism*. Scotus took over Anselm's assertions of two inclinations of the will towards advantage (*affectio commodi*) and towards justice (*affectio justitiae*). To Scotus, even more than to Anselm, the inclination to advantage (*affectio commodi*) was an expression of God's design for nature's perfection. In Scotus words: 'Take away this inclination [to advantage] and you destroy nature' (*Ordinatio* 4sup.d.49.q.9-10; W&M,

185). To Scotus, though, there was only one justice, in God himself, still it affected the creation too by causing God ‘to give to natures such perfections as are due or becoming to them (*Ord.* 4.d.46.q.1.nn.4, 7-9; Wolter, 1990, 158). God was a ‘debtor to creatures out of His liberality’, the creation being ‘a kind secondary object of this justice’ (id. n.12; Wolter, 1990, 158, 196). So due to God’s benevolence, He willed His creatures to strive to self-perfection.

To Scotus, as to Anselm, the inclination to justice moderated the inclination to advantage (*Ord.* 2.d.6.q.2; W&M, 469). Scotus’ innovation was to distinguish justice, being infused by grace, from justice, being innate to will (id., 469-71). The innate justice represented the first check on the inclination to advantage (id., 471). The justice lost as a result of the original sin was the infused justice (ibid). The innate justice was a natural inclination to fair dealing. The infused justice was already an inclination to self-abnegation brought by grace. So Scouts overcome Anselm’s failure to explain a need for inclination to justice after the Fall (when it of no use). Even after the Fall man would moderate his inclination to advantage by the innate rules of justice.

The rules of justice, according to which the inclination to advantage was controlled, were ‘received from a higher will’ (*Ord.* 2.d.6.q.2; W&M, 471).³⁷ Boler conceded that the inclination for justice originated from ‘the higher will’.³⁸ He, however, saw its relation to God’s will merely in the sense that ‘God had so created rational agents’

37 To Scotus, a will, not an intellect, was rational, having to do with opposites, and, hence, having power of self-determination (Shanon, 1995, 42).

38 Boler, 1993, 124. Lee debated Boler contentious observation, that to be free would be ‘not ability to chose between alternate course of action, but the capacity of the will to refuse to act’ (Lee, 1998, 40-54; Boler, 1993, 115). Lee pointed out, that Boler denial of the relation between free will in the sense of ‘superabundant sufficiency’ and the two inclination was an attempt to distance from ‘the eudaimonistic picture of morality’ (Lee, 51). Lee noted, that the inclination for justice had meaning of the restraint (Lee, 1998, 53). He however did not described the inclination for justice as Right Reason. Neither Boler, nor Lee, or Wolter did notice the middle Stoic connection of Scotus-Anselm dual inclinations.

(*ibid.*). He missed Wolter's observation that to Scotus 'rules of justice' and 'dictates of right reason' were equivalents (Wolter, 1990, 155). Moreover, a dictate of right reason was natural law! This natural law was given by God as the rules of justice by means of God's Commandments!

To Scotus, though, not all the Commandments were the natural law precepts in a strict sense of necessary truth. The whole creation was contingent on God's will, the only necessary good being God Himself as benevolent Creator. Only the precept to love God was a 'practical truth prior to any determination on the part of the divine will' (Ord.4.d.46.q.1.n.3; Wolter, 1990, 159). Only the moral precept, which had God as their immediate object, being necessary truth known from its terms, did belong to natural law strictly (Ord.3.sup.d.37; W&M,277). Hence, not even God could dispense the first table of the Decalogue (*ibid.*). Thus, Scotus distinguished between the two tables of the Commandments. From the four commandments of the first table, only the first two were a part of natural law in the strict sense (*id.*, 281).

The second table (which dealt with man's duty to his neighbour) was not necessary in the strictest sense, because they were not immediately directed to God as last end (*Op.Ox.3.d.37.n.5*; Harris, 1927, 1, 186). For, even if the precepts commanding man to love his neighbour belonged properly to the law of nature, man could wish his neighbour to love God but not to preserve his corporeal life (*Ord.3.d.37*, W&M, 285). In regard of the second table of the Decalogue in the exceptional cases, where right reason dictated a deviation from the strict letter of the Law and the divine command permitted it, a licence was possible (*Op.Ox.4.d.38.q.1.n.4*; Harris, 1927, 2,329). Moreover, it would be possible to conceive a state of society, in which the rules laid

down in the Decalogue would not apply, such as one where there could not be theft because all goods were held in common (*Op.Ox.3.d.37.n.8*; Harris, 1927, 2, 329). Thus, before the Fall there was no natural law prescribing distinct *dominium* of things, but all things were in common, as it was more in accordance with right reason.³⁹ Scotus, hence, distinguished between the original [necessary] natural law of the state of innocence, where man still loved God for His own sake, and the divine rules of justice, introduced after the Fall, when man lived by self-love.

Nevertheless, all the Commandments were part of natural law in a broad sense (*ibid.*). Due to God's benevolent will for creatures' perfection, all the Commandments were, in a sense, in accordance with right reason. The rules of justice, prescribing by the Decalogue, forbade actions, which were bad in themselves (not bad merely because they were forbidden), so, too, an action, bad in itself, could not be made good, even if per impossible God were to command it (Harris, 1927, 2, 332).

2.1.3. Summary of Scotus

Scotus' innovation, which seemed to have been rather underestimated, was to transform Augustinian *anti-legalistic voluntarism* into a new kind of *legalistic voluntarism*. He was a *legalist* as far as for him there was no doubt in the necessity of the Commandments for human fallen nature. Scotus' most profound innovation was to understand natural law, as right reason, being God's Commandments (the higher rules of justice) in a new

³⁹ Firstly, in the state of innocence no one had taken what was necessary to another. Such use by anyone, who came upon it first, did not constitute exclusion of the other, or expropriation. Secondly, the precept to have all things in common was revoked after the Fall. Because the wicked and greedy took more than necessary to them, even by violence; so the stronger fighters deprived others of necessities. Thirdly, once natural law precept was revoked and permission was granted to appropriate things, the actual distinction of the common things came about by positive law (*4Sent.d.15.q.2*; Kilcullen, 2002, 2,900).

legalistic voluntaristic sense. Scotus took over Anselm's synthesis of Augustinian anti-legalistic voluntarism with the Middle Stoic vision of natural law as trade off of inclination to self –advantage and justice. He then integrated it with the early Christian legalism. The middle Stoic inclination for justice, now situated in the will, became God's Commandments as dictates of right reason, which moderated man's inclination to self-advantage to enable him to live in society. By situating the inclination to justice in the will, Ockham escape the weakness of the intellectualistic notion of justice as right reason, unenforced by the will.

Scotus was, like Anselm, an Augustinian voluntarist as far as he assumed that the true free will lost after the Fall. To Scotus, as to Augustine, the state of grace differed sharply from the current depraved state. Only by God's grace could man love God above all for His own sake. In this state of grace man was free in his will by loving God above all from his fallen nature. It was, essentially, the Pauline-Augustine vision of human freedom in the spirit and love of God, as contrasted to bondage of flesh and self-love. The law of nature was immutable only as far as it had God as its object. So the only natural law precept in a strict sense was to love God.

Nevertheless, to Scotus, in contrast to Augustine, self-love was natural, being an expression of God's design for creatures' perfection. To Scotus, even more than Anselm, the inclinations for justice and advantage were natural in man. God, 'debtor to the creatures from liberality', created man with the inclination to self-advantage in order to strive to the natural self-perfection. Scotus' innovation was to see the inclination to self-advantage in the Aristotelian sense of the perfection of nature - he, thus, legitimated the natural life.

Still, Scotus legitimated the natural life only ‘temporally’ until the coming of God’s grace. In the state of grace the ‘innate’ inclinations to self-advantage and to natural justice, which enabled man to live in society, were as if transcendent by the ‘infused’ inclination to love God above all. In advance on Anselm’s position Scotus distinguished between the inclination to justice, infused by grace, lost after the Fall, and the inclination, still innate to man. The former constituted the only necessary precept of natural law to love God for His own sake. The latter constituted the precepts of the second table of the Decalogue, given after the Fall when man already couldn’t not love God merely for His own sake. These [contingent] rules of justice were prescribed by God, to enable man to live in society. God’s *legalistic* Commandments were nevertheless innate to man, being according to right reason, and a part of natural law in broad sense. This natural law, as the second table of the Commandments, defined the temporal rules of justice, contingent upon God’s will to create nature the way He had. Though, God could dispense with this natural law, He had willed for His Creation the rules of justice, which were not arbitrary or against right reason.⁴⁰ Scotus, thus, returned to the early Christian justification to the Old Testament legalism as the ordinance aftermath of the original sin.

It was left to Ockham to push even further the *voluntaristic* boundaries of natural law as God’s will discerning by Right Reason.

2.2. Radical Voluntarism of Ockham

The focus of this subsection will be on Ockham's radical *voluntarism*, which resulted in his new *legalistic* vision of the Commandments as the expression of God's assigned rationality of human language. It will, then, be argued that there was no inherent incomparability in Ockham's claim that natural law was from God's free will, as well as a dictate of right reason. Ockham's rather 'minimalist' approach to natural law was further strengthened by his voluntaristic vision of the original human condition (as man's original *dominium*) as well as the condition after the Fall as entirely dependent upon God's Will. As a result of his legalistic concern with the content of the original *dominium* and his assimilation of the Thomist notion of natural justice (equity) Ockham advanced an idea of natural right as the original common *dominium*. The argument will be directed against the view that Ockham put forward the idea of natural right as a sort subjective power unrelated to the notion of *dominium*.

William Ockham (1280?–1350), a Franciscan friar and active participant in the controversies of his age, was possibly the most celebrated voluntarist in history.

Ockham asserted even further than Scotus the omnipotence and freedom of God. To Ockham, as to Scotus, God's will did not need direction. (McGrade, 1974, 194). 'Ockham's razor', the principle, that plurality should not be assumed without necessity, in Leff's view, reflected the fundamental teleological truth, that God was a free Creator and not dependent upon creatures for his effects.⁴¹ But in comparison with Scotus,

40 God's precepts (the second table of the Decalogue) could be revoked in some especial cases by God's command and according to Right Reason.

⁴¹ Whatever God could produce by the secondary causes, he could produce and conserve immediately (*Quodlibet* 4.q.6; Leff, 1975, 17). As Scotus, Ockham (against Aquinas) denied any internal necessity in relation between secondary causes (*Ordinatio* d.17.q.17.D; *ibid.*). God was a first and contingent cause of

Ockham questioned even the immutability of the precept to love God, since God was under no restriction not to will man to hate Him (*Sent.* 4.q.16; Kilcullen, 2002, 876). To Ockham (in comparison to Scotus), God was a debtor to no one unless He so ordained (*Sent.* 4.3-5; Adams, 1999, 264). So, He was not obliged to have a ‘good’ will in respect of His creation (to desire the creature’s self-perfection, for instance). God could not will ‘badly’ because to will ‘badly’ was to will against one’s obligation, but God had no obligations (*Sent.* 2.15; Adams, 1999, 264). In contrast to Scotus, to Ockham God was not obliged to bind Himself to the creatures of finite goodness by the laws he established.

Ockham went further than Scotus in affirming not only God’s free will, but also that of man. To Ockham, as to Scotus, the intellect was natural and could only act necessarily. In this way Ockham reaffirmed existence of right reason as evident knowledge. So willing (or ‘nilling’) was due to the will exclusively (Leff, 1975, 539). Will was the only source of all good and evil, merit and demerit, in virtue of being the one created free power (Leff, 1975, 542). So man could will evil even ‘for evil sake’ (Adams, 1999, 260). Ockham did not deny that the inclinations to justice and advantage pertained to human will, but alongside many other inclinations (*Sent.* 1.1.6; Adams, 1999, 255). The inclinations for advantage and justice defined the scope, not of what was willable (or ‘nillable’), but what could be elicited according to dictate of right reason (*Sent.* 1.1.6; Adams, 1999, 260). To Ockham no inclination was natural ‘either in the sense of defining will’s scope or in the sense of causally determining its action’ (Adams, 1999, 255).

everything (*Reportatio* 2. qq.4-5.E), contingency being power to do otherwise (*Ordinatio* d.1q.2.F; id., 460).

2.2.1. To be Just by Willing Right Reason

To Ockham, like Augustine, deformity was in the will. Sin was in the will opposed to God (Leff, 1975, 503). Some moral acts were better than other, according to the ladder of virtues of the will, beginning with natural virtues (justice, temperance, fortitude) and proceeding to teleological ones (faith, hope, and charity), needed for salvation, and centred on love to God.⁴² To Ockham, virtues were ‘virtues’ of the will, hence prudence was not considered by Ockham as virtue. Prudence as expressed by right reason was knowledge what should be done (Leff, 1975, 481). In order to be naturally virtuous, man needed to will (to act in accord) right reason, at least as a partial object of willing (id., 485-6).

To Ockham, in order to behave ‘naturally righteously’ man should will right reason. Why? Probably, because God made man with reason in His own image. So only rational creature could follow God’s Commandment and have capability for self-government. Through right reason, God communicated with man, in respect to his natural life. To be rational in his natural life man should follow right reason. To Ockham, right reason amounted to ‘evident knowledge’. Right reason, being derived from evident knowledge made available to man by God, was independent of man’s will. To will right reason was to follow God’s Will in man’s natural life.

⁴²There were five stages of the moral virtues (King, 1999, 233-4). The first three demanded Right reason. The fourth added to it the love of God, and the fifth implied transcending the ordinary human condition (id. 235)

Evident moral principles were intuitively perceived by right reason.⁴³ Such precepts as ‘don’t lie’ or ‘don’t kill’ could be known evidently, or intuitively, through its terms. Sinful acts called ‘robbery’ or ‘adultery’ or ‘hate’ for the very reason that they were contrary to God’s precepts, which was what their meaning connoted (*Reportatio (Rep.)* 2.q.19.O; Leff, 1975, 496). In Ockham words: ‘...if [the precepts hate, theft, adultery and the like] were thus done meritoriously by the wayfarer, they would not be called or named theft, adultery, hate, etc., because those names signify such acts not absolutely but by connoting or giving to understand that one doing such acts is obliged to their opposites by divine precepts’ (*Sent.*2.15; Kilcullen, 2002, 876). Would God decree differently and so make the currently sinful acts as not sinful any more (*Rep.*,2.q.19.P; Leff,1975, 496). Because of God’s omnipotence His decrees were the ultimate measure of all value (*ibid.*). So it was not that God would contradictorily order man to hate him, but ‘hate’ would not be hate, because the whole system of references would change. But presently God did command to love Him (not hate). So there was no ‘wreckage of morality’ as Adams conceded with other critics of Ockham (Adams, 1999, 265-6). It was rather, as McGrade pointed out, that Ockham brought God into the moral picture and yet limited man’s set of beliefs about God (McGrade, 1999, 275).

Moral knowledge, as God’s command, was rational in the sense of rational use of the given language. Right reason, derived from self-evident knowledge, guaranteed non-contradictive usage of language. Still the same ‘label’ (if God would will so) could denote a different reality. There was no ultimate criterion for moral right or wrong apart from the will to obey right reason and God’s commands. Ockham’s innovation was to

⁴³Moral knowledge derived from evident (universal) propositions theoretically and from experience (Leff, 1975 489). Self-evident knowledge was ‘intuitive’ through its terms or ‘immediate’ from experience (*id.*,

see right reason through the rationality of the language, designed by God. Natural law was a dictate of His right reason. To Ockham (as to ‘nominalist’), the terms of this language reflected our concepts about things rather than the real nature of those things. To Ockham, (as McGrade put it) God could indeed change our obligations under natural law, but only by creating a world with the different laws of nature (McGrade, 1999, 278).⁴⁴ Ockham also went beyond Scotus’ Aristotelian assumption of innate self-perfection of Nature. There was no presumption of natural self-perfection, integrating in his natural law, apart of the presumption of rationality of ‘language’ of right reason.

2.2.2. Precepts of Natural Law as Law of Right Reason

To Ockham, too, since God was a founder of nature, he was a founder of natural law, which was also revealed in the Scripture (Ockham, *Dialogue (Dial.)* 3.2.3.6). But the precepts of the Law of the Scripture were confirmed by right reason. As dependent upon natural reason natural law was given to all men (not only believers) (*Short Discourse* 3.8, 91). The dictates of right reason determined the content of natural law. However, not all of the natural law precepts were of the same weight. There were precepts for all human nature, for intact nature and for corrupt nature. The precepts varied in degree of its validity to right reason.

In *The Dialogue* Ockham described the first mode of natural law as a law in conformity with natural reason that in no case fails, as expressed by such command as ‘Thou shalt not commit adultery’, ‘Thou shalt not lie’ and so on (Ockham, *Dial.* 3.2.3.6, in *MPP*,

314).

⁴⁴ McGrade described Ockham’s natural law as a tacit divine command (McGrade, 1999, 276)

500) This mode of Natural law, being absolute precepts, never failed (ibid). Hence the first mode of Natural law reflected self-evident universal moral principles, discovered by Right reason. In this sense it was immutable, invariable and admitted no dispensation.⁴⁵

The second mode of natural law was a law of natural equity, observed without any human custom or constitution in the state of innocence (i.e. the state of nature), when all men lived in accordance with natural reason or the divine law (*Dial.* 3.2.3.6, 502). In the second sense of the law of the state of nature all things were in common, and all men were free (id, 500). It was a law of reason that in no case failed. This ‘natural equity’ mode of natural law was common to all nations until, or unless, the contrary was ordained for reasonable cause (*Dial.*, id.,502). In *Breviloquium de Principatu Tyrannico, Short Discourse on Tyrannical Government (SD)*, Ockham defined natural equity in the sense of what was in conformity with right reason (Ockham, *Short Discourse* 2.24). In his *Opus Nonaginta Dierum, Work of Ninety Days (WND)* Ockham also defined natural equity as a law of heaven (*ius poli*), which without any human or even purely positive divine ordinance was consonant with right reason, whether it be consonant with purely natural right reason, or with right reason understood from those things, which were divinely revealed to men (*WND* 65). Hence, Ockham assimilated *ius poli* to *ius naturale* as a power by which all men make use of things in the state of nature (Brett, 1997, 67).

⁴⁵ Still it could be subject to God’s exemption by direct intervention (*Dial.*2.24.; Kilcullen, 866)

Ockham held that after the Fall the second mode was suspended, and the divine law gave human beings power to make laws permitting and regulating appropriation (*SD* 3.9. n.41). Thus, as a result of the original sin due to ‘avarice and desire to possess and use temporal things wrongly, it was useful and expedient that temporal things should be appropriated and not all be common, to restrain the immoderate appetite of the wicked for possessing temporal things and to drive out neglect of proper management and administration of temporal things, since common affairs are commonly neglected by bad men’ (*SD* 3.7, 89).

Still, even after the Fall by the second mode of law of nature man could use what belonging to another in a case of extreme necessity (*Dial.* 3.2.1. 10, *SD* 3.8. n.3, 91). This second mode of natural law was still in place after the Fall as a law of conditional natural equity, by which, one should not use something belonging to another against his will, and still, in a time of extreme need, one would be permitted to use of the thing against the will of an owner (*SD* 2.24).

Property and slavery were established on account of original sin under the law, common to all nations, i.e. the law of nations, but not under the first or second modes of natural law (*SD*, id.). Thus this mode of natural law related to the *condition* after the Fall, dictated by the law of nations or some human law. This mode of natural law was all common to all nations on the condition that all nations decreed (ibid).⁴⁶ The third mode

⁴⁶ The Law of Nations was a law of civilised institutions common among the nations in contrast to the second mode of Natural law as a law common for mankind in the primitive condition of the state of Nature. Ockham’s notion of the conditional Natural law was wider than notion of the Law of Nations. He said that many things that belonged to the Law of Nations were of the conditional Natural law (*Dial.* 3.2 6) The conditional Natural law was in place not only under the Law of Nations, but also under human law.

was a conditional natural law, which could be deduced by evident reason from the law of nations or from some human deed, unless the contrary was established by the agreement of those to whom the matter pertained (Ockham, *Dial.* 3.2.3. 6, 501). It was not immutable but permissible law. The third mode of natural law could be described as further inferences from the inferences (Coleman, 1999, 51)

So, *on condition* that things and money had been appropriated by virtue of the law of nations or some human law, then evident reason dictated the restoration of thing entrusted, or money that had been lent, unless the person to whom it pertained decreed otherwise (*Dial.* 3.2.3.6 ,*id.*). Similarly, once someone might use violence injuriously against another, then it could be inferred by evident reason that it was permissible to repel such violence by force (*ibid.*).⁴⁷ But those were not natural law either in the first or second sense, because men, who lived according reason and natural equity alone, would have nothing to be deposited or lent and no one would inflict force on another (*ibid.*).

Only the first mode of natural law was right reason as ‘self-evident knowledge’ for all the times. To Ockham, committed to the ideals of Apostolic poverty, the higher natural law dictated absence of political subjection and private property. However, after the Fall corrupt man was unable to live up to his natural condition. By God’s intervention man was allowed to appropriate things. The conditional natural law helped man could rationally adapt to the conditions after the Fall.

⁴⁷ This Ockham’s denial of Natural Right of self-defence was in apparent conflict with his discussion in Short Discourse of man’s Natural Right to refuse to abide of the authority in the time of necessity.

2.2.3. Ockham's Natural Right of Original *Dominium* as manifestation of Natural Law of Natural Equity

Ockham's assumption of the different modes of natural law was rooted in his vision of insuperable divide in human condition as manifested in man's *dominium* before and after the Fall. Before sin there was no avarice, or desire to possess or use any temporal thing against right reason (*SD* 3.7, 89). The original *dominium* was a power of reasonably ruling and directing temporal things without suffering resistance or harm (*WND* 14.75-92; *SD*, 89, n32). This *dominium* was a physical power of treating thing at one's will and pleasure, in the sense of man, having *dominium* over a horse, when managing the horse as he pleased by means of reins or other physical instruments (*SD* 3.15, 103). In the state of innocence God granted to the whole human race *dominium* as power to manage and use temporal things to their advantage but without power to appropriate any temporal thing to any one person or to any particular collectivity or to certain people (*SD* 3.7, 88).⁴⁸ This common original *dominium* was brought in by Divine Law (*id.*, 89). After the sin this original *dominium* [as the complete power of ruling over the rest of creation], common to the whole human race, was lost (*SD* 3.7, 88).

⁴⁸ This original *dominium* was not Adam's exclusively. Adam did not have the exclusive *dominium* before sin, since he could not deny it to Eve and the others, and Eve's *dominium* would come to her, when she was made, not by Adam's gift or sale or otherwise, but by virtue of God's first gift, by which He gave it to Adam for himself and for his future wife and for others they would beget (*SD* 3.15, 102). Ockham was arguing against the pope John XXII's assertion that God granted Adam *dominium* over the whole world, so there could not be common ownership when only one person existed (Tierney, 1997, 154-5; 158-9). To Ockham Adam's [original] *dominium* was not the exclusive ownership, but rather [common] *dominium* as of the first monk in the newly founded monastery, where if another would become monk he too would have the same kind of *dominium* as the first member (*WND* 27.51-70). Ockham's common *dominium* though was not the communal ownership, but a power of using of *res nullus* (*WND* 14.148-215), which did not demand the consent of the community as Tierney noted (*id.*, 163).

God also gave man and all other animals a power to use certain external things (the natural *potestas utendi*) (WND 14.93-106). Thus grasses and trees with seeds had been given commonly to men and other animals for food (ibid.). This power was not lost after the Fall. Man also kept the common *dominium* by which beast and fowl were his possession, at least in the broad sense of possession [!] (SD 3.15, 103).

Possession in the sense of the exclusive *dominium* did not emerge immediately after the Fall (SD 3.7, 89). For some time after the Fall men had a power to divide and appropriate the things held in the common *dominium* (WND, 14.359-67, SD 89, n33).

The exclusive *dominium* in the sense of exclusive ownership was given by God as a remedy for the original sin. This state of the exclusive *dominium*, suited to deprived nature, corresponded to the third mode of natural law. Ockham defined such '*dominium*' as a principal human power of laying claim and defending a temporal thing in court and of treating it in any way not forbidden by natural law (WND 2.389-97).⁴⁹

To Ockham, the positive 'rights' of property derived from exclusive *dominium* after the Fall.⁵⁰ 'Use of right' was then a certain positive right by which one had licit power to use things belonging to another, preserving their substance (WND 2.127-54). The

⁴⁹ Already the Franciscan Bonaventure had distinguished between *ius*, *dominium* and *proprietas*, on one side, as involving the appropriation attitude towards external goods, *ius seu proprietas*, and, from another side, *simplex use (de necessitate vitae)* (Brett, 1997, 18). Bonaventure used such legal terms as *proprietas*, *possessio*, *usefructus*, *simplex usus* (Kilcullen, 2002, 27). The papal Bull *Exiit Qui Seminatur* issued in 1279 by Nicholas III, gave even more precision to the terminology, instead of *simplex usus* it introduced *ius utendi* and *simplex usus facti*, where *simplex usus facti* was merely a license to use goods, revocable at the will of the consider (Lambert, 1961, 144). Nicholas' incorporation the specification of 'use of fact' into 'simple use' was meant to separate the realms of fact (*factum*) and of right (*ius*), so *simplex usus facti* was not *de jure* significant activity (Brett, 1997, 19). Importantly, *ius* and *dominium* were equated in the sense of their contrast to a simple *de facto* relationship, although *possessio*, *usefructus* and *ius utendi*, while all being *dominium* in a sense, were not quite *proprietas* (ibid.).

⁵⁰ On the medieval development of notion of *dominium* as *ius* see Appendix 3.

positive ‘right of using’ (*ius utendi*) was a licit power (*potestas licita*) of using an external thing of which one ought not be deprived against one’s will, without one’s fault, and without reasonable cause, and if one had been deprived, one could take the depriver into court (WND 2.155-84). A ‘use of right’ was thus a ‘right of using’ of another’s things, preserving their substance, i.e. in relation to the things not consumed, like food, through use (WND 2.127-54). To Ockham, such positive right, which one can defend in the court, differed from any use by merely ‘grace’ or licence, which could be withdrawn on the pleasure of the *dominus* (WND 2.127-54).

In contrast to ‘use of right’, being a part of exclusive *dominium*, ‘use of fact’ (*usus facti*) was a part of the original natural power of using the things (which was not lost after the Fall). A licit ‘use of fact’ existed in the state of innocence (WND 60.52-53). ‘Use of fact’ was then every act anyone performed in relation to an external thing, such as eating, drinking, wearing, writing, reading a book, riding, and the like (WND 2.117-26). Ockham referred to the pope Nicholas III’ Bulla *Exiit* to claim that ‘use of fact’ was necessary use in contrast to ‘use of right’, which was not necessary ‘to food, clothing, divine worship and edifying study’ (WND 58.167-86).

Ockham, thus, attempted to defined ‘use of fact’ as a natural power. John XXII however argued that any act of using, pertained to the state of perfection (as the state of Innocence) was a just act (!), which was the act with ‘right of using’ (WND 59.1-10).⁵¹

⁵¹ John XXII’s argument in *Cum Inter Nonnullos* (1323) that use without right would be unjust (and about things consumable by use) possibly originated with the Dominicans (Lambert, 1961, 241-2). In his *De Paupertate Christi et Apostolorum* the Dominican H. Nedellec advanced the view, that, although minors, like children and animals, were capable of use without *dominium*, man, capable of reason, was one unquestioningly capable of the licit and illicit, the just and unjust; it was immoral for a rational creature to make itself like irrational (Brett, 1997, 55-56). JohnXXII however reformulated Nedellec’s position in terms of ‘rights’, rather than *dominium* (ibid.). B. Tierney attracted attention to the originality of John

To combat this argument Ockham then attempted to separate the natural right of using from the positive right of using (WND 60.89-100). The natural right of using (*ius utendi naturale*) was the way of providing for the sustenance of nature by law of heaven (*ius poli*) (ibid). Such natural right of using was common to all men because it was from (the state of) nature (WND 61.34-69). However, men did not have it for all time, but only for a time of extreme necessity, when they could licitly use every present thing without which they could not preserve their life (ibid.). Still, men could not renounce this natural right of using (WND 61.116-122).

Ockham held that this natural right of use was never completely relinquished, and could be revoked in the times of extreme need (by the second mode of natural law of natural equity in a virtue of the original common *dominium*). This natural right of using also could be revoked outside of the time of extreme needs by licence of *dominus*.⁵² So Ockham effectively accepted John XXII's claim that 'just use' should be by 'a right'! He conceded to the opinion of John XXII, that it was impossible to have licence of use

XXII in the Bull 1323, where, in answer to the Franciscan arguments, that the use by permission or 'licence' of the owner could be just and licit without any 'right of using', the pope replied that anyone who used by licence, in fact, had a 'right of using' (Tierney, 1991, 463). The pope not only repeated his assertion from the previous Bull, that there could not be just use without a right, but now referred explicitly to Gregorian Decretales title *De Verborum Significatione* (X.5.40.12) (ibid). This text, before John, was interpreted, as Tierney showed, as meaning, that what possessed justly was possessed by the law, (i.e. by 'objective' civil law, and not by 'subjective' right) (id., 460). John XXII then reinterpreted the text, usually understood as referred to the law, in the sense of 'right', stating, that one, who used without a right, used unjustly; and, if one used it justly, it followed, that he used it by right, because what was done justly was done by right (id., 463).

⁵² In Kilcullen and Scott's view Ockham meant, that though a permission (licence) to use was not a 'right' it united natural right (Kilcullen, 2002, 123-144, n.56). So Ockham's licit power (*potestas licitas*) was a right (*ius*). As Kilcullen pointed out, this natural right was not a right in John XXII's sense of the positive 'right of using' (id., 46). A licence to use was not a positive 'right of using'. However, the Franciscan principal claim, which Ockham tried to defend against John XXII, was that the *simple act of use* was not an act of any right. And this claim appeared to be indefensible! The power to use goods in extreme necessity was by *ius naturale*, i.e. by a (natural) right, since, even outside extreme necessity, man could use the things through the licence (*licentia utendi*) of the *dominus* by *licita potestas utendi*. Hence, it too would be a right, and not simply a use of fact (Brett, 1997, 65).

without some 'right' of using, because it would be unjust use. Though, to Ockham this 'right of using' was not a positive but a natural right.

Still, Ockham was forced to answer to John XXII's argument that man, as a rational creature, should use external things differently from irrationals, i.e. not only licitly but justly, so use 'by right' should also be a just use. He proceeded to define a just power as a licit power, without connecting it in any way with the positive right of using (WND 60.161-6). A just power was then a licit power in accord with right reason (WND 60.119- 60). So any licit act would be just so far as it would be morally good (WND 60.160).

Was Ockham about to develop the notion of 'right' (*ius*) as a licit subjective power to act inaccordance with right reason outside any relation of the control over the things (*dominium*), as Brett and others maintained? (Brett, 1997, 62-3) It might be true that Ockham's concept of licit power as a power consonant with right reason did not directly rely on the notion of *dominium* as exclusive possession. Still, such licit power consonant with right reason was not some 'subjective right' to act unrelated to any notion of *dominium* over external things. Ockham's licit just power was about the right of using external goods, which were in somebody else *dominium*.⁵³ To Ockham, however, the just use was not by the civil law but by the (second mode of) natural law or by natural right of equity. Licit power of using things in question was not a positive 'use of right' but a just use by the licence of the *dominus*, 'activating' natural right. Still, this natural

⁵³ Tellingly, Ockham's definition of the positive 'right of using' as a licit power of treating the things, and defending it the court, precisely coincided with his definition of exclusive *dominium*. Brett herself conceded the relation of Ockham's definition of right of using as licit power to his definition of *dominium*, when she noted the confusion of Ockham's notion of licit power and just power (Brett, 1997, 63-4).

right to use things in the extreme necessity in accord to the second mode of natural law resulted from God's grant of common *dominium* (!) to men in the state of nature. Thus, Ockham, willingly or not, did advance the notion of natural right as original *dominium*.

In summary, Ockham's second mode of natural law of natural equity defined the natural right of the free use external things, given to man in the State of nature. Ockham indeed advanced the voluntaristic vision of the intact state of nature, where God given man the original *dominium* excluded any possessive relationships. His vision was the one of paradise (where, one could imagine, wild beasts were to follow man as domesticated ones and all the fruits of the trees would get in his mouth without labour). This perfect power of ruling over the rest of creation however was lost. To Ockham, still, men also possessed a natural power of using things (together with all animals). However, he was unable to develop notion of natural right based on this animal power to use things which was not *dominium* (since animals did not have *dominium*). Ockham conceded that man also continued to enjoy some sort of *dominium* over the rest of creation common to all men in virtue of their superiority of reason the *image* of God. Namely, this notion of the original *dominium* laid a foundation of his concept of natural right.⁵⁴ He, although, attempted to ignore the potentially possessive, yet not exclusive character of the original *dominium* over the things common to all men. Ockham, however, conceded that this natural right was more than a natural power of animal to preserve itself. By this natural right man used things freely, without offence to others, in the state of nature. Still, even after the Fall, when God permitted the appropriation of things, man could still revoke

⁵⁴ It was left to Grotius to base property rights on the original right to appropriate things.

his natural right to use the things belonging to other either through licence of the owner or without licence in the times of extreme necessity.

2.2.4. Ockham's Social Contract arising from God's dispensation after Fall but rooted in Natural Right of Natural Equity

The voluntaristic emphasis upon original sin implied a more limited scope of natural law and, hence, the wider scope for the human will. To a voluntarist Ockham, the social contract was a natural explanation of the political society, which emerged as a result of the original sin. So after the Fall by the new divine grant men were left to establish private possessions according to their will. Moreover, they were also left free to enter into society. It will be argued that such man's power to set a political society as activated by a special divine dispensation after the Fall was ultimately rooted in his natural right to rule over himself.

To Ockham, after the Fall, the previous divine ordinances, such as absence of *dominium* of subjection, or property (due to natural equity), was revoked. As result it was left to the free human will to determine the actual conditions of society, unless there was the divine ordinance otherwise. After the Fall, in a view of depraved human nature, a new power to appropriate temporal things to a person or persons or to a collectivity was granted to the human race by God (*SD* 3.7, 90). Yet another power, to establish rulers with temporal jurisdiction (for living well and politically), was also granted by God to mankind without human ministry or cooperation (*ibid.*). Thus, God gave men (without human ministry or cooperation) a power to appropriate temporal things to a person or persons or to a collectivity, as well as a power to establish rulers with temporal

jurisdiction to live well and to live politically (*SD* 3.7, 90). In his *Work of Ninety Days* (*WND*) Ockham defined *ius fori* (the law of forum) was a just thing constituted out of explicit pact or ordinance human or divine; it was a power originating in an agreement, sometimes conforming to Right reason, sometimes not (*WND* 65).

In book 4 of his *Short Discourse* Ockham considered the relationship between divine and human law in the establishing of the state. There were three ways to establish a legitimate empire. Firstly, it was, without any violence, through the free and willing consent of people voluntarily subjecting themselves to authority. ‘For from God and nature all mortals born free and not subject to anyone else by human law’ had the power voluntarily to set a ruler over themselves, just as they could establish a law for themselves (*SD*, 124).⁵⁵ Secondly, a true empire could be established through a just war (*ibid*). Thirdly it could be established by a special divine ordinance revealed by a special miracle (as Moses’ rule) (*SD*, 125).

Still, men (both believers and unbelievers) could renounce this twofold power to appropriate temporal things and establish political power or be deprived of it for some fault or reason, apart of the state of necessity (*SD* 3.8, 91; n.38). But, unless they were deprived judicially by someone with legitimate power men, even unbelievers, could use

⁵⁵ After the establishment of the empire by human ordinance, the emperor regularly had no temporal superior except God alone, though he could have superiority on occasion (*SD* 4.8, 117). Men with power to confer temporal jurisdiction, and power to make laws, conferred it on the emperor. Nevertheless once that conferring of jurisdiction by God and men had been done, it still depended on men, since on occasion the people had power to correct the emperor, just as on occasion a slave had power to use physical force on his lord (*SD* 4.6, 114-115).

this power, even, apart of a situation of necessity, when they were obliged to use it (SD 3.8, 92).⁵⁶

Ockham's theory of the original contract was marked by his *voluntaristic* adherence to God's omnipotence and man's subsequent 'residual' free will. To Ockham, with his narrow scope of natural law, without the direct divine ordinance there was no way to set up government but by human will. After the Fall, God gave to man a double power to appropriate temporally things and to set up public authority. Thus, men had a power, which was never fully relinquished, to set up a political society (or, effectively, to entry in 'social contract', although, Ockham did not use the term). Ockham did not consider a contract of society as a contract of submission with entry but without exit. Men could still generally use this power, and were even (!) obliged to do so in the state of necessity, when the current society appeared to be in disarray. In such case, as if, the existing society was *de facto* dissolved, and, as if, men were reversing to the condition, when they were granted by God a power to appropriate things and to set government. But such power, which man necessary revoked in the extreme circumstances could be nothing else than man's natural right of natural equity, the same natural power that man revoked in the state of necessity in respect of the use of things! Then, natural right of natural equity was nothing else as a natural power of the original *dominium* of man to use things in virtue of being with reason in the image of God!

⁵⁶ By divine and natural law men were given a power to set up a judge and ruler with power to coerce those subject to him, but it was not always by divine law that someone had that power over them (SD 3.11, 95).

2.2.5. Summary of Ockham

It has been argued that Ockham advanced a new limited *legalistic-voluntaristic* concept of natural law. Ockham's natural law was, ultimately, an offshoot of God's free will. The absolute natural law precepts were generated by the core legalistic Commandments, being God's ordinances, through 'rationality' of language. Thus, God ordained, that 'murder' signified a wrongful killing, and 'adultery' a wrongful sexual relationship. Ockham's limited concept of natural law was due to his *voluntaristic* vision of the divergence of the original state of nature and the civilised condition after the Fall. To him, there was a sharp contrast in human condition (man's *dominium*) before and after the Fall. Only before the Fall man had *dominium* as a free power to use the things without suffering resistance. The new conditions of private property and political subjection were not inferences from natural law, but introduced by God's dispensation after the Fall, which gave man a new twofold power to appropriate things and to set political society. Such human condition already depended on the will of men and the circumstances. However, men could still judge civil law to be in accordance with, or against, right reason. In this sense, men were living under a conditional natural law. The role of natural law precepts here was what McGrade called a rational response to non-rational and contingent circumstances (McGrade, *PTWO* 183). However, men, still, could discern the absolute Commandments of natural law by right reason, as well as they still could revoke their natural rights of natural equity.

Ockham was forced to accept that, even after the Fall, man kept the original common *dominium* by which God gave man a power over the rest of creation. From this original

dominium a natural right of using the things was originated, which pertained to the second mode of natural law of natural equity of the state of nature. Even, outside of the state of nature, in the case of extreme necessity (or through the owners' licence) this natural right was still hold by man. Thus, in the condition of extreme need, the present divisions of property were dissolved, and men were again free to use things, as if in the state of nature. Ockham, however, used slightly different story in respect of political society. In the case of the extreme need, when society, as if, was dissolved, men appeared to revoke not a natural right but a right to set government, given them after the Fall. Surely, a state of the extreme needs, in respect to political society, should be treated analogically the state of the extreme needs, in respect of private property!!! Then the twofold power to set government and to appropriate property was to be rooted in the same natural right of using things, rooted in man's *dominium* over the things, due to his superiority of reason in the image of God!

Ockham's position was not so much scepticism about human understanding as a 'sober caution about human will' (McGrade, Political Thought of William of Ockham188). Ockham's *legalistic voluntarism* by no means aspired to man's liberation from the will of God, or from right reason aiming at the correct interpretation of God's will in the course of man's natural life. Man would will, and act, with right reason because he would will to do as God willed him. As later noted by Suarez, a law could not be merely a dictate of right reason, but behind any law there should be the binding will of a law-giver. In this sense man would follow his right reason, namely, because it was commanded by God- Creator.

Ockham's contribution was to draw attention to the ultimate dependence of natural law upon the free will of God, which led to an understanding of the insufficiency of demonstrative concept of law as leaving unanswered the question about the sources of the obligation under the law. His other bequest was in the notion of the natural right of man as defined by the original *dominium*.

Chapter 6

Late Scholastic Natural Law

Chapter 5 was concerned with the clash between *intellectualism* and *voluntarism* in the Scholastic natural law theories of 13th and 14th century. This chapter deals with the attempts of the late Scholastic intellectualism to come to terms with the 14th century voluntaristic reformation of natural law.

The key disagreements in Scholastic natural law, respectively defining *intellectualistic* or *voluntaristic* leanings, were outlined by Suarez in his acclaimed systematisation of the debate:

Was God's will under the dictate of His reason or free?

What was natural law: a demonstrative law of human reason or a prescriptive law of God's command?

Did wrongness of a deed arise from the evil inherent in the deed or from the law-giver's prohibition?

Thus fourteenth century *voluntarism* raised a crucial question about the ultimate source of man's obligation under natural law. The late Scholastics' thought on natural law sought to come to terms with this *voluntaristic* 'revolution' of the 14th century by means of a synthesis of *voluntarism* and *intellectualism*. The late Scholastic transformation of *intellectualism* led to a new eclectic vision of natural law. On one hand, natural law was to be discerned by human reason. Natural law prohibited an

inherent evil, i.e., something was evil, because it was discerned by reason as such, rather than because it was forbade by God. On the other hand, man's obligation to follow natural law was thought to be arising out of God's command.

Vitoria, the founder of Salamanca School, tried to reconcile the *voluntaristic* concept of law as God's Command with the Aristotelian *intellectualistic* natural law as 'natural inclination'. Vitoria, paradoxically, used the voluntaristic notion of divine natural law as a law of God's superior will as a proof of the infallibility (or inevitability) of the intellectualistic concept of natural law. Vitoria's contribution to intellectualism was in his project to assimilate Aquinas' idea of natural law as 'natural inclination' to Aquinas' other notion of natural law as natural justice. Vitoria, nevertheless, failed to integrate his idea of natural law as 'natural inclination' to his eventual vision of natural justice as natural right. This his later idea of natural right was rooted in the Early Christian legalistic vision of man receiving natural law and the natural *dominium* in virtue of his reason in the image of God. In contrast, his earlier Aristotelian idea of natural inclination as pertaining to the whole of nature was incompatible with this his later vision of natural right as natural *dominium* as pertaining to man only.

Suarez's renowned study of the intellectualists-voluntarists divide was a manifestation of his consistent efforts to proceed with intellectualistic-voluntaristic synthesis¹. His analyses of voluntarism led him to separate the questions of the *source* of the *obligation* under the law, and of the *content* of natural law. By assimilating the voluntaristic concept of law as law-giver's command Suarez attempted to salvage the intellectualistic

core of natural law. Suarez' analyses of the intellectualists' vision of natural law led him to discard as inconsistent the Aquinas-Vitoria 'natural inclination' version of it. In contrast, Suarez adopted Aquinas' intellectualistic vision of natural law as evident knowledge, or right reason. His advance on Aquinas was in the concept of the permissive natural law, aside of the prescriptions and prohibitions, as related to man's natural rights.

The thesis of this chapter might be formulated as following. Firstly, the Scholastic intellectualism failed to refute the voluntaristic claim that only God's Command could constitute an obligation to adhere to natural law. Secondly, though the Christian intellectualism never dispensed with the idea of God as Creator, it still held its ground in respect of the rationality (intelligibility) of natural law.

The contribution of this chapter might be seen in a critique of the late Thomist Aristotelian theory of natural law as 'natural inclination', as well as the favourable reappraisal of Suarez' voluntaristic-intellectualistic natural law synthesis.

The first section will deal with Vitoria, the second with Suarez.

1. Vitoria's Natural Law: Law of Rational Nature of Divine Command?

¹Suarez' diagnosis of, and his response to, the weakness of *intellectualism* might warrant him more prestige as a thinker than he sometimes afforded.

Francisco de Vitoria (1483-1546), a Dominican and professor of theology at Salamanca from 1526, was a leading figure of the Scholastic revival.

It will be argued that Vitoria used the voluntaristic ‘prescriptive’ notion of law (at least in respect to positive divine law) that was at odds with his intellectualistic ‘demonstrative’ concept of natural law. He took over Aquinas’ concept of natural law as ‘natural inclination’, which, in the sense of ‘rungs’, or grades, of inclinations, pertaining to the whole ladder of creation (from common to every substance to self-preservation to specifically human). Vitoria saw ‘natural inclination’ in the Aristotelian sense of *telos*, or end, which was natural to the thing, as it was natural for fire to burn. Vitoria’s innovation was in his attempts to assimilate this vision of natural inclinations to Aquinas’ notion of a ‘naturally just’ thing. In the case of man ‘natural inclination’ meant ‘natural illumination’, as mental recognition of the law of human nature. So Vitoria attempted to intellectualise the concept of ‘natural inclination’ as natural purpose. This intellectualistic concept of natural law was, however, underpinned by a voluntaristic notion of God’s will in respect of His Creation. He, thus, attempted to voluntarise his concept of natural law by implicitly accepting that to recognise obligation under natural law was not the same as to follow it. Vitoria’s contribution to natural law was to develop a new understanding of ‘just thing’, going beyond his Aristotelian concept of ‘natural inclination’ as a natural power pertaining to any created thing. He advanced the notion of natural right as man’s just power of original *dominium*, in virtue of his reason in the image of God.

1.1. Vitoria's Divine Law of Command.

Vitoria advanced a voluntaristic understanding of the divine law as binding by the force of God's will, which was as if at odds with his intellectualistic understanding of natural law as 'natural illumination'. Vitoria's voluntaristic treatment of God's law was especially apparent in his *Concerning Civil Power (De Potestate Civili*; 'The Spanish Origin of International Law', Appendix 3). Vitoria's logic was not without problems. He claimed that God's will rendered a law as just and binding. He even suggested God's will was the only criterion of good and evil. However, he also claimed that that God's will had a force of reason. A divine law of revelation was necessary because man's understanding could fail.

Divine law was superior to human law, because it was derived from God alone, and could not be abolished nor abrogated by any one; whereas human law was established by man, and could therefore be abolished or annulled by man. In the case of divine law, since divine will had a force of reason, the law-giver's will rendered the law as just and binding, in contrast, the will of the [human] legislator did not render human law just and binding, so the precepts of the latter were to be advantageous to the state and in harmony with the other [human] laws (16, lxxxv). Divine law, hence, endowed a thing with the quality of a virtue or vice. So nothing was a vice apart for the reason that [divine] law prohibited it. For all goodness on the part of human will consisted in conforming to divine will and to divine law; while all wickedness sprang from non-conformity with divine law as with a rule by which all human acts should be guided (16, lxxxv).

Vitoria, however, also distinguished between the guiding force (*ius directia*) of the law and its coercive force (*ius coactiua*) (*Commentaries on Summa Theologica (Com.ST) 1.2.96.5*).² In this connection he mentioned the punishment of Hell.

There was one divine law (*Com.ST (On Law) 1.2.91.5*). Divine law of revelation required besides natural law and human law, because human science [understanding] was full of errors and required a great deal of time to reach conclusion (*ComST 1.2.91.4*).

So divine law was a manifestation of a superior law-giver's will. Vitoria's definition of law was, as if, based on a voluntaristic notion of command. God as Creator established what was just. Divine will was a 'guarantee' of justice. Human law, in contrast, had the justification in utility, not justice. It was, as if, Vitoria subscribed to the voluntaristic view of law as being a good or bad, not in itself, but ultimately in the relation to law-giver's will. To Vitoria, however, God's will had a force of reason. Was the revealed divine will 'an insurance' in a case that natural human understanding became beclouded? Was, then, divine will binding in respect of natural law? Man should obey natural law naturally, but just in a case of failing to follow his reason, there was also the divine command. Vitoria, then, had a new emphasis on divine will as the source of obligation.

1.2. Vitoria's Natural Law of Natural Inclination as Just Thing

Vitoria's definition natural law, nevertheless, was an *intellectualistic* one. To him, the

²Vitoria, *Political Writings*.

whole point of natural law was its intelligibility. Vitoria, like Aquinas or Aristotle, ascribed the natural inclination to all things. Though, in the case of rational creatures, the law of their nature was recognized by natural illumination.

Not only in matters related to nature, but also in man-made constructions, ‘necessity’ should be considered from the view-point of purpose, which is first of all causes, and the principal one (2, lxxii).

To Vitoria, as to Aquinas, there were three types of natural inclination: to self-preservation, common to all substances; to procreation, common to all animals; to knowledge and life in society, common to all rational beings (*Com.ST* 1.2.94.2; id., 171).

Natural law was not a matter of the will but of reason and enlightenment (*Com.ST* 1.2.90.1; id., 156). Natural law was a true and obligatory law, however invincible a person’s ignorance was (*Com.ST* 1.2.90.4; id., 160). To give command belonged to reason, not to a will (*Com.ST* 1.2.90.1; id., 156). In contrast to reason, the will could be inclined to do the opposite (*ibid.*). But through reason a natural necessity was manifested. Without a guidance of reason, human will would not be naturally inclined to right thing.

Natural law was recognized by natural illumination (*Com.ST* 1.1.57.2.5; Brett, 126). Natural law could be call a ‘disposition’ not because it was a disposition (*habitus*), but because it was habitual (*in habitu*) (*Com.ST* 1.2.94.1; id., 169). Natural law was so called, because man could judge what was right by natural inclination, but not because

of some naturally implanted quality (*qualitas*) (ibid.). The understanding would tell man what was true (e.g. life was good, parents should be loved) and the will would incline towards it (*Com.ST* 1.2.94.2). If the thing was against natural inclination it was prohibited, if it was according to natural inclination it was a precept.

Vitoria embraced the classification of natural law as pertaining to the thing's purpose. A specific natural law belonged to different kinds of creatures, by not the same law was common to all animals, rational and irrational (*Com.ST* 1.1.57.3 'De iure Gentium et naturale' ; *On Law of Nations; The Spanish Origin of International Law*, cxi). Many things were of natural law, and not all of them affected all created things, as a burning by fire was not common to stones; so some things were common only to men, like worshipping God, being of themselves good things (ibid., cxii).

Natural law (*ius naturale*), moreover, declared what was equal and absolutely just. Right, or what was just, as a 'right' from its own nature, balanced the 'right' of another. Thus, the precepts of natural law in respect of man were: to return a deposit; do not do wrong to another, if no wrong was done to you. The other precepts were: to worship God, to honour one's parents, to love own country. They were right of themselves, not as a means for something else (ibid., cxi).

In comparison, the law of nations (*ius gentium*) was of equity and justice only in a relative sense, when something was made equal to another in relation to a third thing, just as property might be made private, with a division of property ordered for the peace and concord of men, which could not be preserved unless man had his own property clearly defined (ibid.). The law of nations was a result of [common] human agreement.

1.2.1. Summary of Vitoria on Natural Law as Natural Inclination

Natural law in the sense of 'natural assent' related to all animated creatures, although not to all created things (Brett, 1997, 125-6). In the case of man natural law was recognised by natural illumination. Vitoria's stress on 'natural illumination' reflected his development of Aquinas' meaning of natural law as natural inclination. Vitoria subscribed to the general Aristotelian understanding of natural law as a natural power pertaining to every created thing, as it pertained to a fire to burn. In this sense natural law was not confined to rational, or even animated, creatures. Unlike Ulpian, Vitoria also denoted natural law as, the not common, but specific inclination (proper operation) of the thing. Vitoria attempted to integrate Aquinas' idea of natural law as natural inclination with Aquinas' definition of law of nation as the naturally just thing. Some things were recognised by man's illumination as the natural inclinations of human nature and, hence, as the just things for man to do. The precepts of natural law were just absolutely and could not be a subject of dispensation. Vitoria contrasted these naturally just things with the things justified out of consequences. The law of nations, as being established by human will and not by God, was not absolutely just. Still the law of nations (by which private property and servitude were established), as acquired through the consent of men, was just in the relative sense of having advantageous consequences. Still, he self-inconsistently considered the commandment to return deposit (implying private property) as naturally just, and an absolute precept of natural law. But his natural law did not contain regulation in respect of private property. Private property was only a relatively just thing, being part of the law of nations.

There was an even deeper self-inconsistency in Vitoria's reasoning. On one hand, some things were just from their own nature. On another hand, the only good was to obey of God's will, which had a force of reason. But the only purpose of human reason was to be illuminated in respect of own natural inclination. So to obey God's will, man (merely) needed to follow his natural inclinations. What sort of moral choice was it?

1.3. Vitoria's notion of *Dominium* as Natural Right

Vitoria not only defined natural law as natural inclination, being naturall just thing. He eventually assimilated the concept of the naturally just thing to the idea of natural right. To this end he resorted to the early Christian vision of man made with reason in the *image* of God as relating to man's original *dominium*. He used the notion of the natural *dominium* as implying 'right' to differentiate the 'just' things from unjust. As a result, Vitoria effectively repudiated his own (previous) understanding of natural law as natural power pertaining to any created thing!

The notion of natural *dominium* as natural right was developed in the first relectio 'On the Indias Later Discovered' (*De Indis Noviter Inventis*).³

³The first section of On Indias was written in 1537-1538 (Fernandez-Santamaria, 64 n.) The dispute: could the Indians be considered as natural slaves, and could their land (and property) be conquered? Vitoria's position became acclaimed in history as he refuted both statements in question. Vitoria argued against the view that the Indians were natural slaves, and as such could not possess dominion and, as result, their possession could be taken away by the Spaniards. Vitoria's proof that the Indians possessed *dominium*, or ownership, began with observation that if the aborigines had not *dominium*, no other cause was assignable except they were sinners or were unbelievers or were witless or irrational (1. 4, The Spanish Origin of International Law, Appendix A, vi). He then proceeded to dismantle of the arguments supposedly supporting the claim that the Indians did not have *dominium*.

While natural *dominium* was a gift of God; civil *dominium* was an institute of the human law (1.6.1, vii-viii). (Natural) *dominium* was founded on the *image* of God, with man being in God's *image* by nature, i.e., by his reasoning powers (1.6.3, viii). In the same way God made His 'sun to rise on the good and on the bad and sent His rain on the just and on the unjust', so also He had given temporal goods alike to all man, good and to bad (1.6.7, viii).

Dominium was not simply a power to put a thing in to one's own use (as brutes had a power over the herbs and plants) (1.20, xi). *Dominium* was not merely a power, without signifying 'right' (*ius*) (like fire having *dominium* over water); for then a robber had *dominium* over his victim (1.20, xii). Irrational creatures could not have *dominium*, because *dominium* was a 'right'; irrational creatures had no right, because they could not suffer wrong (!). He who kept off a wolf or lion from its prey or an ox from its pasture would not do it a wrong. If brutes had *dominium*, he, who took away the grass from stag, would commit theft, for he would taking what belong to another against the owner's will (1.20. Proof 1, xi-xii). Wild beasts had no *dominium* over themselves; therefore much less over other things, since they might be killed with impunity (1.20. proof 2, xii) The brutes were rather moved than moved themselves for that reason they had no *dominium* (20. proof 3, xii). Only rationals had *dominium* over their acts, since man had the power of choice.⁴ The most conspicuous feature of man was reason, but a

⁴Moreover even children could have *dominium* (1.21, xii). Boys even before they had the use of reason could have *dominium*. They could suffer wrong; therefore they had rights over things; therefore they had *dominium*, which was nothing else than right (ibid). The basis of *dominium* was the possession of the *image* of God, and children already possessed the *image* (1.21, xiii). The same did not hold for irrational creatures, for the boy did not exist for the sake of another, as did the brute, but for his own sake (1.21, xiii). Even those suffering from perpetual unsoundness of mind could still have natural *dominium*, because they could suffer wrong; therefore they had right. Whether they could, or could not, have civil dominion was a matter of civil law (1.22, xiii). Those who were not over-strong mentally were capable of *dominium* alike over themselves and other things, otherwise this would be slavery, wherein none slave by

power was useless if not reducible to action (1.23, xiii). Man also had *dominium* over that which was placed within his control. (1.20, xii).⁵ The basis for *dominium* was the possession of the *image* of God (1.21, xiii).

1.3.1. Summary of Vitoria on Natural Right

So Vitoria's notion of natural right, advanced in *On Indians*, represented a shift from his previous concept of natural law as inclination of thing, being its naturally just power, developed in the *Commentary* on Thomas Aquinas' *Summa Theologica*. His new idea of natural right, signified by man's endowment with natural *dominium*, was already an offshoot of a different vision of natural law, as confined to man only. With respect to man natural law was not merely a power, but a 'right'. Man's *dominium* would not be only power to put things in his own use. Now Vitoria argued against the organic notion of 'right' as natural power, or inclination, as 'right' of tree to bear fruits (which he himself used in his *On Civil Power and Law of Nations*). Natural power, or inclination, of irrational was not just power, or thing, after all. Instead, he argued for notion of natural 'right' of man as a 'just thing' in a virtue of natural *dominium*.

The intellectualistic notion of 'natural justice' had not been fully developed by St. Thomas. So Vitoria turned towards the legalistic thinking. 'Natural right' was an outcome of man's natural *dominium*, in a virtue of him made with reason in God's own

nature (24, xiii-xiv). Man, even the sinner, could not lose (natural) *dominium* over his own acts and over his own limbs, for he had a 'right' to defend his own life (1.6.1, viii). (Natural) *dominium*, being based on Natural Law, also could not be destroyed by want of faith (1.7, ix).

⁵ In contrast to Ockham, Vitoria's notion of *dominium* bore the possessive meaning (as something which could be violated) going beyond of the meaning of merely (animal-like) power of using.

image⁶. Vitoria 's ultimately voluntaristic vision of God as a Creator of natural law related to his legalistic genesis of (natural) 'right' from God's grant.⁷ Vitoria relied upon the early Christian Father's notion of man by gift of reasoning power made in the image of God. In virtue of his reason in the image of God, man received an original natural *dominium* over himself as a power over own body, and own actions. Man's *dominium* was also over things which were put under his control. Man hence had his natural 'right' of *dominium* as his natural entitlement. It would be unjust to deny man his natural *dominium*. Moreover, in contrast to irrational creatures, man's power of using things could be used justly and unjustly. The purpose of human reason was to distinguish between just and unjust. It was unjust to kill or to enslave man as far as it was unjust to take away his original *dominium* over himself. So man's natural 'right', as a just power, could not be equated with an inclination, as merely natural power of animal to use the fruits of the earth to feed itself.

1.4. Vitoria's Natural Indissoluble Society

The younger Vitoria adhered to the Aristotelian vision of natural inclinations as natural purpose of the thing in his treatment of society. The Aristotelian vision of society as natural body was paradoxically combined by Vitoria with his voluntaristic vision of the

⁶Tierney noted that in *De justia* (Com.ST 2.2.62.1) Vitoria provided the Aristotelian explanation of man's *dominium* over the remainder of the creation due the principle that the less perfect things existed for sake of the more perfect (Tierney, 1997, *The Idea of Natural Right*, 263). But Vitoria's logic in *On Indians* was of a different *legalistic* kind. Because any man (however imperfect) possessed (!) the natural *dominium* from God he could not be justly denied of it. Man could not be denied his *dominium* even for the sake of a more perfect man.

⁷ Vitoria (Com.ST. 2.2.62.1) took over Aquinas meaning of law as the ground for *ius*. To Vitoria whoever had faculty in accordance with the laws had a 'right' (ibid.; Tierney, id., 260).

binding force of natural law in divine ordinance. God was the author of nature. Men could not abolish God's ordinance to live in society. As a result, Vitoria's 'natural' social contract was a contract of submission without any escape clause. To Vitoria, the origin of a full [coercive] political state was from God and nature. Vitoria effectively played down the significance of the Fall, going even beyond St Thomas.

In his first reflection *Relectio De Potestate Civili, On the Civil Power (CP)*, Vitoria expanded the Aristotelian view of the natural origin of society and the state from the view of its natural purpose.⁸

The first conclusion which he undertook to prove was, that all power - whether public or private - by which the secular state was governed, was not only just and legitimate, but as ordained by God, it could not be destroyed or annulled even by consent of the whole world.⁹ The two claims were of the primary importance here. Firstly, civil power was ordained by God. Secondly, civil power could not be destroyed by consent of people. The explanation of such authoritarian position laid in Vitoria's (Aristotelian) vision of the natural origin of society. By God, and, thus, by nature, man was made for life in society.¹⁰

⁸Thus not only in matters related to nature, but also in man made constructions, 'necessity' should be considered from the view-point of purpose, which is first of all causes, and the principal one. (*CP 2; The Spanish Origin of International Law*, Appendix C, lxxii)

⁹*CP 2; The Spanish Origin of International Law*, lxxii.

¹⁰Man was superior to other animals in reason, wisdom, and speech. Still man was denied many things which it granted to the rest (of animals) (3, lxxiv). Nature left man alone frail, weak, needy. It was necessary that men should not wander singly and in solitude, after the manner of wild beasts, but should dwell in a fellowship in which they might be aid to one another (4, lxxiv). Moreover understanding would be impossible in solitude (without instruction and experience); speech, which was 'the messenger of understanding' would be of no value outside of sphere of human society (ibid). The perfection of will was also impossible without society. And the will, whose chief ornaments were justice and friendship, would

To Vitoria, as to the Aristotelian, man was naturally inclined to live in society, and this meant submission to some public power. So to Vitoria, not only a pre-political society (as to Aquinas), but the state, too, was of natural origin. Vitoria conferred on the inclinations to live in society and to live under the political power to the same status under natural law. So to him, every society was necessary a state!

Society sprang from nature, as a mean of protecting and preserving mortals (5, lxxv-vi). God was the sole author of natural law. So if only public power was by natural law then public power was from God too (6, lxxvi). The states also had their origin not in the invention of man, but sprang from nature' (5, lxxv-vi).

There were, however, 'even some Christians', who argued that since in 'the happy age of innocence there was neither master nor servant' there could not be *dominium* over other men, but only over animals (7, lxxvii). Vitoria reply to the doubts about the naturalness of subjection of man to man was that the power of kings [public power] was 'derived from divine and natural law, not from the state itself, not directly from men' (8, lxxviii).

If God created for men such a necessity and inclination that they could not subsist except in a social state and under some ruling power, than these very conditions were also derived from God (6, lxxvi). It was impossible for people to live without

be entirely deformed and could not be practised except by the multitude; and the same was true of friendship (4, lxxv). The community was a form of intercommunication thoroughly in accord with Nature (4, lxxv). In a rather *voluntaristic* fashion Vitoria stressed not only impossibility (without communication with others as manifestation of society) of the perfection of intellect but also impossibility of perfection of will.

government. For if councils and assemblies of men were necessary to the security of mortals, than no society could exist 'without some force and power to govern and provide for it'. For if all were equal, and subject to no power, then each individual would draw 'away from the others in accordance with his own opinions and will', so the commonwealth would be torn apart; and the state would be dissolved - unless there was 'some providential force to provide for the common welfare and consider the common good' (5, lxxvi).

Before men gathered together into the state no one was superior of the others, hence, there was no reason in the assembly for one man to assume power over the others, since there was no reason to depose the power of government in one man rather than in another (7, lxxvii). And since by natural and divine law there ought to be a power for government of the state, hence the community was self-sufficient and had power to govern itself (7, lxxvii). The power to elect government was from natural law, since the human race at one time possessed this power, it was still able to do so; for this power, being derived from natural law, did not pass away (14, lxxxiii).

Nevertheless, the state had its power not [merely] by agreement for the sake of the public good, so all men should will to set up over themselves some power - but from God [Himself] (8, lxxx). The power of self-government existed in the state [political society as a whole] and would continue to exist therein even if all the citizens were unwilling (!) to continue to participate in it (8, lxxx).

The power of the state was derived from natural law, even though the authority [the ruler] had been chosen by the community. The society as a whole by choosing the ruler

transferred not merely the whole its power, but also its own authority. Therefore, just as a power of the state was established by God and by natural law, so the same was true of all kingly power (8, lxxx).

Public power was the faculty, authority, or ‘right’, to govern the civil state (10, lxxxi). No power of this sort could be abrogated by the consent of men (10, lxxxi). For if a man might not renounce the right and the means of defending himself, since these functions (of self-defence) pertain to power by natural and divine law (10, lxxxi), likewise the state could not be prevented from exercising this power over its citizens to preserve the integrity of the whole for sake of the public good (7, lxxvii). The state could not be deprived of power to protect itself, which it could not fulfil without public powers; and consequently, even if all citizens agreed (!) to dispense with these powers, in order that they might be bound by no law and with no one to command, the agreement was null and void, being contrary to natural law (10, lxxxi).¹¹

1.4.1. Summary of Vitoria on the Compact of Society

Vitoria’s doomed project was to apply to a society the Aristotelian vision of ‘natural inclination’ as natural purpose pertaining to every thing. The society was, then, a sort of self-governed entity (body) akin to natural body of man. Part of the explanation of Vitoria’s insistence on the impossibility of dissolving the state as such was in this vision of society as natural entity, aimed at self-preservation. Such an entity was, to him, not

¹¹ The actual authority of the state was a choice by the community, but not necessary by consent of all. For the state had the power of self-government, and the act of the greater part was the act of the whole; therefore, the state might accept the form of government that it desired, even if this be not the best form’ (14, lxxxiii)

merely dispersed multitude of men but necessarily an organised society, a state. The state, as a natural body, had a capability of self-government as a manifestation of natural inclination to self-preservation.

Conceding that in the state of nature men were equal, Vitoria proceeded to the conclusion that the state was of natural origin, in spite of that the Aristotelian vision of naturalness of the state rather precluded the idea of the original natural equality of mankind. To Vitoria, since society had its inner purpose, the subjection of the parts to the whole was in the natural order of things. By natural law the society had power, i.e. 'right' to self-government and self-defence.¹² With a use of force being admitted into the state of nature, such force must be derived from divine and natural law. By the assertion that the power (of the authority) of the state was not derived directly from men, Vitoria attempted to prove that society was natural, and not merely a result of human invention. The natural law origin of the state meant, to him, that it was more than merely human will (realized in human law) to enter (or dissolve) the society. Admitting that the political authority was chosen by people, Vitoria, nevertheless, insisted that, by establishing the authority, the community effectively transferred all own power to it. Since the whole power of state was from natural law, and not from human law, hence, the same power was to be attached to any chosen authority.

There was a problem with Vitoria's 'natural body' analogy between society and man. Vitoria had a vision of natural law as natural inclination. But this vision contradicted his own later insight that natural law in respect to men was more than a merely natural

power: it was 'a right'. It was 'a right', because man, as a rational creature made in the image of God, was able to suffer wrong. But how could the state as an artificial entity have such 'a right'?!

Vitoria subscribed to the social contract premise, at least for the origin of the public authority, although he did not use the term. Vitoria even admitted that the form of government and the particular authority were chosen by the community. Moreover, this power to set the authority was never relinquished, in contrast to the power to leave society. But if, to Ockham, men were able to regain their natural right to dissolve political society in the situation of necessity, to Vitoria men were 'damned' to be subjected to it. But man had this natural right of the original *dominium* over himself as God's grant. Wouldn't then the violation of man's natural dominium be unjust and against natural law?!¹³

1.5. Summary of Vitoria

The purpose of this section was to demonstrate the incompatibility of the Aristotelian vision of natural law, as natural inclination pertaining to the whole nature, with the early Christian Fathers legalistic vision of natural law as given by God to man, in a virtue of his reason in the image of God.

¹² Tierney discussed the contradiction of Vitoria's organic vision of society to his presumption of man's right self-defence (Tierney, 1997, 296-300)

¹³ In his discussion *On Law* Vitoria accepted that the ruler was not above the law, for the ruler was to act against Natural Law if he was not subject to his laws concerning Commonwealth (*Com.ST* 1.2.96.6)

Vitoria's project was to elaborate the intellectualistic vision of natural law as a law of the Aristotelian 'natural inclination'. His advance over Aquinas was in the attempt to assimilate the notion of 'natural inclination' to the idea of natural law as 'just thing'. He, then, moved to reformulate 'natural inclination' as natural right. However, the whole Aristotelian notion of natural inclination began to crumble, because natural right of man appeared to be more than 'natural inclination'. Natural right already had, to Vitoria, a meaning of 'just', which pertained only to rational creatures. To Vitoria, the original *dominium* was founded on the image of God, in man's natural reasoning power. Man's natural right differed from a natural power of animals. The animals did not have *dominium* over themselves or over the external things and, hence, couldn't suffer wrong. Man had control over his acts as a *dominium* over himself and, hence, *dominium* over the things, placed under his control. He also could use his natural power justly or unjustly. Man also could suffer wrong; and it would be unjust to deny his natural right of *dominium*. In his notion of natural right Vitoria went beyond Ockham. To Vitoria, natural right was originated in man's *dominium* over himself in a virtue of his reason, which as a power of choice would be useless, if it was not reducible to action. To Vitoria, man's *dominium* over himself presupposed *dominium* over the things. Moreover, his concept of natural *dominium*, in a sense, presupposed a 'right' of possession (although Vitoria considered that *dominium* of (private) property was of the civil law). If a right, which flowed from *dominium*, was entirely non-possessive, it could not be 'unjustly' violated (for there was nothing to be violated).

The failure of the Aristotelian intellectualistic idea of natural inclination was especially apparent in Vitoria's vision of natural law as applied to society. If man naturally inclined to live in political society, then the political society, the state, was natural. Even

the social contract presumptions were paradoxically used by Vitoria to support his analogy society with natural body. As man had a natural right to defend himself, so the state had too. Thus, paradoxically, the proof of man's subjection to authority was based on man's natural right to self-defence. As a result, Vitoria's 'natural' social contract of submission denied man any natural rights, which he supposed to have, apart of the one to live in the society, which he couldn't leave.

Vitoria's Aristotelian intellectualism was, moreover, compromised by his ever present appeal to superior will of God, the author of nature, as the ground for submission. Vitoria used the voluntaristic concept of divine law to support the Aristotelian intellectualistic vision of the natural purpose of the whole nature. God was the author of nature and of man. God willed every created thing to have natural inclinations they had.

In sum, Vitoria did not give clear answer on a question, was God's will free in creation? Divine natural law had for him the Aristotelian intellectualistic meaning of natural inclination. He also subscribed to the intellectualistic view that reason did command the will. He, however, tacitly implied, rather like a voluntarist, that the (additional) obligation to obey natural law proceeded from God's superior will. On the question, whether natural law prohibited that which was inherently evil, as the intellectualist, he defined the innate good (or evil) as being in accord (or discord) with the natural inclination as inner standard of nature itself. Still he also said that the evil was ultimately in disobedience to God's Will.

It was left to Suarez to advance a consistent *intellectualistic-voluntaristic* synthesis.

2. Suarez's Intellectualistic-Voluntaristic Synthesis

Francisco Suarez [1548 – 1617] was the one of the last contributors to the Scholastic revival at Salamanca. Suarez, a thinker of the stature of Aquinas, who he came rather too late in his attempts rebuild and consolidate Scholastic orthodoxy in order to resist Protestantism and Scepticism.

It will be argued here that Suarez truly achieved the synthesis of *voluntarism* and *intellectualism* in his concept of natural law. He adopted and advanced the voluntaristic notion of a law as a command. Still he refuted the extreme assumptions of voluntarism that God's free will meant that God could change His will in an arbitrary manner, and, so, change the law of nature. He introduced a more rigid criterion for non-contradiction in respect of God's will, implying that God could not be a deceiver. In respect of the content of natural law Suarez embraced Aquinas' intellectualistic understanding of natural law as 'evident knowledge', or right reason, but rejected his 'natural inclination' theory of natural law.

The thesis of the section will run thus: Suarez advanced the concept of natural law by distinguishing between the voluntaristic concept of obligation under the law and the intellectualistic concept of the content of natural law. To Suarez, a moral obligation amounted to more than a merely natural illumination: it needed a law-giver's will to underpin it. To him, 'law' as a moral command pertained exclusively to rational creatures. He, moreover, modernised Aquinas' intellectualistic vision of natural law as 'evident knowledge' by embracing the concept of natural rights of *dominium*, which defined the matters of free human will. Such a 'permissive' natural law, as the natural

rights, corresponded to the respective affirmative and prohibitive natural law precepts (so 'permissive' natural right to property 'activated' the absolute precept, such as, 'do not steal'). Suarez' integration of the natural law commands and natural rights of human *dominium* in the one body of natural law was a true achievement (which appeared to receive much less appraisal, than it deserved). Sadly, Suarez' thought was not immune from self-inconsistency. Thus, his (adopted after Vitoria) Aristotelian vision of naturalness of political society did not fit well with his concept of 'permissive' natural rights of *dominium* pertaining to the matters of free human will.

2.1. Suarez on Intellectualists – Voluntarists' Divide

Suarez developed his famous analyses of voluntarism and intellectualism (although he did not use the terms themselves) in *De Legibus, Ac Deo Legislatore* (*A Treatise on Laws and God the Lawgiver*) (1612).

Suarez effectively divided opinions on the matter of law into two streams: intellectualistic and voluntaristic ones. The dispute was ultimately about the concept of law itself. Did a law proceed from intellect or will? Was reason itself sufficient to create obligation?

According to the one (intellectualistic) opinion a law was an act of intellect (1.5.1). A law then meant a regulation by reason, an instruction, a rule (1.5.3). The (intellectualistic) opinion of the Fathers as well as of Aquinas in respect of natural law amounted to a view of it as natural [right] reason (2.5.9–11). In this opinion natural law resided in man, being written in the heart, it bound man's will as a rule of conscience, hence, it resided in [right] reason (2.5.12). Natural law [as source of obligation] was

then a rule of conscience, which censured or approved what to be done, and which proceeded from a dictate of [right] reason (2.5.12).

Suarez conceded that natural law was, in a sense, [rational] illumination. (2.5.14). But he insisted that there was a difference between a law and a rule of conscience (2.5.15). Suarez conceded that natural law, understood as natural reason, was a ‘demonstrative’ law in the sense of indicating what should be done and avoided, and what of its own nature was intrinsically good and evil (2.6.3). The problem, which Suarez saw with this view (which he hesitated to ascribe, explicitly, to Aquinas), was that such natural law could not be prescriptive divine law. It was one thing to say that natural law was from God, as from an efficient primary cause, but it was another thing to say that the same law was derived from Him, as a lawgiver, who commanded and imposed the obligations (2.6.2).

Suarez, too, outlined the differences in intellectualism itself. The two intellectualistic opinions dwelled on the different aspects of rational nature. The one (to which Suarez himself was inclined), dwelled on [right] reason as a certain natural power ‘to discriminate between the actions in harmony with it and those discordant with it’ (2.5.9). The other emphasised nature itself (2.5.9). According to the latter opinion (among others of Aquinas and Vitoria) natural law was inherent in rational nature itself (2.5.2). A certain action was evil, because it was out of harmony with rational nature; hence nature itself was the standard by which actions were measured (2.5.3). So the precepts of natural law (as lying was evil) were either principles self-evident from their own terms, or manifest conclusions necessarily derived [by natural assent, or illumination] *prior* to any judgement of reason (2.5.4). According to this vision nature fell into

category of law (ibid.). Suarez objected to this (intellectualistic) concept on the voluntaristic grounds that natural law as a standard [of rational nature itself] was not properly a law, since it neither commanded nor [even] illuminated (2.5.5).¹⁴ Moreover, natural law in this sense was not divine law, since the precepts of natural law were characterised by a necessary goodness in rational nature itself (2.5.8). In contrast, the obligation of divine law was created by volition (2.6.3). Thus, natural inclinations were not the principles in accordance with which reason dictated natural law, but merely the matter with which natural law was concerned (2.8.4).

This last version of natural law, as a kind of ‘natural assent’, supposed to pertain to man as an illumination in respect of the things, which were in accord with human nature. But what was the point to ‘know’ as far as the existence of ‘natural assent’ would imply that the opposite behaviour could not be an option? Natural law, as a such natural illumination, or inclination, was, then, a disposition or habituation, to act in ‘natural’ way. To Suarez, a law of such natural inclination, understood in respect to man as an innate mode of thinking, implied neither a choice (volition), nor even comprehension.¹⁵

In contrast, the (voluntaristic) opinion of Ockham, Scotus (and Ansem) was that a law was to be an act of the will (1.5.8). Among the voluntaristic requisites for law Suarez listed the will’s capability to move man to act, as well as the binding force of the will

¹⁴ Westerman considered that Suarez criticized Vazques’ view of natural law as rational nature, as in 2.5.8. & 2.5.5.(Westerman, 93-4). But still, later on, she implied that to Suarez, like to Vazquez, natural law was rational nature (id., 100) She seemed not to discriminate, as Suarez himself did in 2.5, between two intellectualistic visions of natural law: as rational nature and as right reason.

¹⁵ Suarez, however, on some occasions used a definition of natural law as ‘natural inclination’ as if such definition did not contradict his preferred concept of natural law as ‘evident knowledge’. So he did refer to natural law as conforming to rational nature, dictating the rational mode (different from the dictate of natural brute instinct) of the preservation of animated nature, such as union of male and female, education

(1.5.15). In such a view natural law was a true divine and prescriptive law. The whole basis of good and evil in matters pertained to natural law was God's will (2.6.4). Hence, God was able to grant dispensation from natural law, even to abrogate the whole lot of it (2.15.3).¹⁶ Suarez described the voluntaristic natural law as exiting in man, being a judgement of [right] reason, revealed to man by God's will, as to what must be done or avoided in relation to those things which conformed to natural reason (2.6.4).

Did Suarez misrepresent voluntarism? Hardly! The whole point of Suarez analyses was to outline the voluntaristic meaning of law as obligation, or command, which was essentially impossible inside the intellectualistic framework. Moreover, Suarez nowhere ascribed the denial that natural law was discerned by right reason to voluntarism. Was Suarez wrong to attribute to Ockham a view of natural law as truly prescriptive law? In support of Suarez, it could be said that the prescriptive concept of law merely denoted the source of the ultimate obligation of natural law, which was in God's will. Rather than misrepresenting voluntarism, Suarez explicitly stated what the voluntarists, such as Ockham, did assume tacitly.

Did Suarez misrepresent intellectualism? Hardly! Vitoria's failure to construct natural law as 'natural inclination' served a proof of Suarez' claim that such vision of natural law incompatible with any notion of moral (or just) choice. To Suarez, the intellectualistic demonstrative concept of natural law left no place for volition. Suarez

of children or preservation of one's own life, and, moreover, forbidding to man many things, from which brutes were not restrained by natural instinct (2.17.6).

¹⁶ In contrast, to the intellectualists, natural law as dictate of right reason was immutable as far as human reason itself was immutable. The voluntarists-intellectualists difference was about the scope of human reason. To the intellectualists, in respect of man's natural life human reason at its best was able to discern the whole divine reason. To the voluntarists, human reason was able to discern God's will only as far as He chose to reveal it.

merely summoned an argument, which was, in a sense, ‘common knowledge’ from the time of Scotus.¹⁷ Surez’ contribution was to distinguish the question of the source of obligation, or binding force of the will, from the question of rational comprehension of the content of natural law by human reason.

2.2. Suarez’ Third Way and God’s Free Will

Suarez attempted to assimilate the voluntaristic notion of law as an act of will to the intellectualistic notion of law as act of intellect: a law was a right judgement and an efficacious will (1.5.20). Ultimately, Suarez held the voluntaristic position that law as obligation was created by an act of will. A law as existing in the lawgiver was ‘the act of just and upright will, the act a superior wills to bind an inferior to the performance of a particular deed’. His deviated from Aquinas in his semi-voluntaristic notion that morally right, wrong, act depended upon the precept of the law.¹⁸ The act of understanding on part of the subject was an application of the cause that creates obligation, rather than the true cause and basis of obligation (1.5.24).

The whole voluntarists – intellectualists’ divide was derived from the dispute over whether the created world was governed by reason or the free will of God. Suarez attempted to assimilate the voluntaristic presumption as God’s will as the ultimate

¹⁷ Grisez considered that to Suarez mistakenly understood Aquinas’ notion of practical reason as ‘theoretical knowledge plus force of will’ (Grisez, 1991, 216). The critique of Grisez’ position was given in chapter 5. Aquinas’ Aristotelian notion of specific ‘practical reason’, dictating to act, was all too apparent manifestation of Aristotelian failure to have feasible notion of will.

¹⁸ Law, in general, was to Suarez ‘a certain measure of moral acts, in the sense that such acts are characterised by moral rectitude through their conformity to the law, and by perversity, if they are out of harmony with the law’ (1.1.5). It was a common, just and stable precept, which had been sufficiently promulgated (1.12.5).

source of obligation with the intellectualistic belief that wrong deed arose from the inherent evil of the deed rather than merely from the prohibition of the Law-giver.

Firstly, Suarez upheld the free will of God. Since God had no superior, He could neither blind Himself through precept or law, nor be a subject to positive law (2.2.6).

Secondly, Suarez attempted to employ the voluntaristic argument of the impossibility of God to be self-contradictory in His will, against Ockham's claim that He could give the two opposing commands. God was unable to act in opposition to His own decree on account of 'the repugnant nature of the act itself; for if He should move in opposition to an absolute decree, there would be in existence, at the same time and from eternity, contrary decree about the same thing and with respect to the same point of time' (2.2.7). God then would have willed absolutely two contradictories, a conception which was repugnant to reason.'(2.2.7).¹⁹ Moreover, divine will was bound of necessity (to the prohibition in question), since God determined to create human nature and to exercise a providential care over it (2.15.12).

Thirdly, Suarez attempted to 'voluntarize' the intellectualistic notion of rationality. God commanded that certain actions should be performed or avoided, in accordance with the dictates of reason; as the will of God was supremely just, so that which was evil could not fail to displease Him, nor could what was righteous fail to please Him, inasmuch as God's will could not be irrational (2.6.8). So a prohibition, or affirmative command, was not the whole reason for good or evil, on the contrary it presupposed some

¹⁹ God's act of creation was a temporal one. It was set in a single act of God's will. So, logically, God's will could not be changed. If He willed man to have a certain nature, He couldn't will man not to have

(inherent) righteousness or turpitude [of action] (2.6.11). The evil could not derive the primary reason for its evil quality from the prohibition since the effect could not be (the reason of) cause (2.6.11). Suarez also referred to the metaphysical principle used by Vitoria that the nature of things was immutable, in so far as, their essence, and the consistency (or inconsistency) of their natural properties, was concerned (2.6.11).

As a result, Suarez reasserted his intermediate position on free will of God, where there was no place for irrational God.²⁰ Suarez was with the *voluntarists* in respect to divine law, in so far as, he held that it was established by free will of God. Suarez, however, distanced himself from Ockham's extreme stand on possibility of God's act in opposition to His own decree, by subscribing to more rigorous concept of a non self-contradictory act. In contrast to Scotus, Suarez denied that God could grant a dispensation from any of His decrees. To Suarez (in contrast to Ockham and Scotus), God, being above of self-contradiction, could not fail to disapprove that which He Himself prohibited. He went even further and claimed that what God prohibited was inherently evil. However, this inherent evil could be understood in semi-voluntaristic way too. God willed, and created, human and others natures from all eternity in a single act of creation. He could have willed and created different human nature. But having willed and created nature with its qualities, God was true to His own commitments, His intentions being just (consistent). Human good and evil were dependent upon human

the same nature in the same single act of creation. Although, God could will a different creation from all eternity.

²⁰ Haakonssen noted that Suarez could (but did not) revoke his own distinctions of *permissio facti* and *juris* (passive and active withholding of disapproval). As Haakonssen pointed out, only the latter would lead to Ockham's paradox (that God could will man to hate Him) (Haakonssen, 1996, 21). In Haakonssen's view, only 'if the human situation prior to the law is amoral, then God's attitude must be understood as mere *permissio facti*', however, it might be unclear 'whether this *permissio* is consistent with a Christian notion of the God, who loves humankind' (id., 22)

nature. So, God laid down some things (actions) as inherently evil for man from all eternity. Suarez position was, thus, a kind of the intellectualized voluntarism.

2.3. Suarez' Natural Law as Law of Moral Self-Government

Suarez took over Aquinas' definition of natural law as man's participation in God's Law laid for creation from all eternity. But to him the divine law as it existed in God's Intellect was deliberation about what course needed be taken upon the decree of God's will.²¹ Thus, natural law was rather the participation of human will in God's will. Suarez' advance, in comparison with Aquinas, was in his vision of capability to moral command as prerequisite for possession of the law. To Suarez, law involved a moral obligation, which only the rational creatures were capable of.

In respect to the (temporal) creation the divine law governed natural and irrational creatures by means of 'natural necessity' (2.2.10). God commanded irrational creatures 'proximately and immediately through His will' (2.2.7). Brute animals were not capable of law in a strict sense, since they had 'the use neither reason nor liberty'; so natural law could be ascribed to them only metaphorically (1.3.8).

²¹ Eternal Law involved a free act of God (2.3.3). Eternal Law was in the intellect of God, it was the knowledge which followed upon the decree of His will as to what course was to be taken in the government of created things (2.3.9). Since there was nothing eternal outside of God, temporal law was [divine] created law (1.3.7). Created law was divided into natural and Positive (1.3.7). Natural created Law was not dealing with the supernatural matters or the matters of free (human) choice (1.3.9). Through the distinction between eternal and divine laws Suarez attempted to overcome a difficulty of the timeless notion of eternal law for a concept of the temporal world. Divine [temporal] law was a law in relation to creatures existing in time. God timelessly willed the law which governed the creatures existed in time. As He willed timelessly, it could not be changed (otherwise, He would will 'in time', subject to the possibility of being revoked).

So the true divine [natural] law related only to rational creatures, as only they were capable of moral obligations, when they acted freely, since all morality depended upon liberty (2.2.11). This law, in relation to the moral obligation of intellectual creatures, was ‘the eternal will of God, according to which rational wills must operate’, if they were to be virtuous (2.3.8). Reason as an exclusive faculty of man made him ‘capable of being subjected to moral government’ by means of [moral] law (1.3.3).

Further natural law, as it existed in men, was an indication of divine will [to obey the dictates of right reason] as a binding force of natural law constituting true obligation (2.6.10). Natural law did not merely indicate what was evil, but actually obliged man to avoid it; it did not merely point out the natural disharmony of a particular act or object with rational nature, but it manifested divine will as prohibiting that act or object (2.6.13).²²

In summary, to Suarez already God’s will preceded God’s intellect. He developed the original concept of natural law as man’s participation in God’s will. Suarez’ concept of a law as command provided the foundation for his natural law confined to men, as depending on rational capability of moral government. To Suarez in the voluntaristic mode of thinking, reason was needed to obey rather than merely to know. To Suarez, as to Ockham, right reason was an indication of God’s will. Through right reason man could recognise God’s Commandments.

2.4. Suarez ' concept of Natural Law as Evident Knowledge

The particularity of Suarez was in his assimilation of the voluntaristic notion of natural law as a God's Command with the intellectualistic vision of it as 'evident knowledge'. As the fourteenth century voluntarists could testify, the vision of natural law as a prescriptive law of God in no way precluded from the view that the content of natural law was to be discerned by human reason. To the intellectualists, such as Aquinas, human reason was fully capable to participate in the eternal law, which God laid for His creation. In comparison, to the voluntarists, the scope of what was to be discerned, or 'evident knowledge', was limited to what God willed to reveal to man. Suarez' intellectualistic allegiance was apparent in his adoption of Aquinas' concept of 'evident knowledge'. Suarez essentially followed to Aquinas in his classification of natural law precepts as consisting the most general principles, the more specific truths known evidently from their terms and the truths known after some rational reflection.²³ However, he also divided natural law on affirmative, prohibitive and permissive precepts.²⁴ Such division enabled him to incorporate in the body of natural law the regulations concerning the civilised conditions as being permissive natural rights of man's *dominium* relating to the matters of human free will. In comparison, Aquinas adhered to the Aristotelian vision of the regulations in respect of private property and

²² Human reason discerned what was evil and good with obligation to follow Natural Law being created as far as it was recognised as an expression of God's will.

²³ Grisez considered that Suarez played down the significance of the primary precept 'Good is to be done and evil avoided' in spite of mentioning it in 2.7.2 and in 2.15.2, since in 2.7.5. Suarez juxtaposed it already as 'The upright is to be done and the wrong avoided' with 'Do unto others as you would have them to unto you' (Grizes, 1991, 207, n.40). As Westerman pointed out, to Suarez (2.7.7), the conclusions, rather than the first principles, were the most vital part of natural law, as well as the [valid] specific conclusions had, to him, the same binding power as the general principles (Westerman, 106-7).

²⁴ Grisez, nevertheless, accused Suarez as 'moral legalist' (who was unable to see that moral value and obligation had their source in 'the end' [of action]) of having no interest in an act which was not

servitude as ‘an addition’ to natural law promoting the common good (as natural purpose of society).

The precepts of the natural law, recognised by natural reason, fell into three classes (2.7.5). The first class of the precepts consisted of primary and general principles, such as ‘Man must do good, and shun evil’, ‘Do not do to another that which you would not wish done to yourself’ (ibid).

The second class was confined to more definite and specific truths evident from its very terms, such as ‘Justice must be observed’, ‘God must be worshipped’, ‘Man must live temperately’ (2.7.5).

The third class was compounded from the conclusions which were evidently deduced from the natural principles by rational reflection; some of them being recognised more easily and by more people than others, such as the inferences that adultery, theft were wrong; other conclusions required more reflection, such as ‘fornication was evil’, ‘usury was unjust’, ‘lying could never be justified’ (2.7.5).

Suarez disagreed with Scotus, who accepted as indispensable precepts of natural law only those which had regard to God (2.15.6-9). To Suarez, such precepts of the Decalogue, such as, thou shalt not kill, thou shalt not commit adultery, thou shalt not bear false witness, and so on, were necessary for the preservation of human nature itself (2.15.10). All Ten Commandments preceded by a certain necessity from nature and

prohibition or command (id., 210). Obviously, Grisez was unaware of Suarez’ permissive natural law

from God as the Author of nature; all tended to the end of due preservation and natural perfection or felicity of human nature, therefore they all pertained to natural law (2.7.7).

Natural law did not include all the ceremonies of the Old Law, or the ordinances related to the Sacraments (2.7.8).

Suarez declined to classify the natural precepts according to their relevance to the state of nature or the civilised state insisting that, on the one hand, natural law was always the same, since the true [general] natural precepts applied to the [both] uncorrupted and corrupted states, and on another hand, that the existence of the precepts was not the same as their actual binding force or application (2.9.8-9). So if there was to be private property then theft was *absolutely* prohibited by God from all eternity.

Suarez instead divided the precepts of natural law into prohibitions, such as ‘do not kill’, and prescriptions, such as of mercy and charity. The precepts prohibiting evil were binding absolutely all the time (2.9.9) The precepts prescribing what was righteous were binding according to the occasion (2.9.9).²⁵ Still, the prohibitions and prescriptions of natural law were binding independently of any prior consent by human will (2.14.7).

Natural law was, however, not only prohibitive and prescriptive, or ‘positive’, but also permissive, or ‘negative’ (2.14.14). Natural law was permissive, concerning acts which might be performed, but neither prescribed, nor prohibited, like taking a wife, or concerning retention and preservation of own liberty (2.18.2). These precepts

precepts, which were the natural rights of human *dominium*.

[concessions] had as their subject-matter human free will, being introduced through the will of men, like the precepts dealing with agreements, obligations, promise (2.14.7). So there was no a change in natural law, but merely a cessation in the binding force of natural law, owing a change in the subject-matter (*materia*) made by men (2.14.13). In the state of innocence the division of property was neither necessary nor useful, or was prescribed by natural law (ibid.). A division of the property was not contrary to natural law in the sense that it did not forbid a division of property without qualification; the same reasoning applied to slavery (2.14.16).

In summary, like Aquinas, Suarez included in natural law the wide range of precepts as natural. He similarly divided the natural precepts into three groups by their degree of validity. To Suarez, natural law, as right reason, or evident knowledge, denoted the moral wrongness or goodness of the action in question, without any reference to natural inclinations or to the end of action. In this sense, the precept 'To avoid evil' was a generalisation of the precept 'To avoid of doing to others what you do not want to be done to yourself'. Suarez advance of Aquinas was in presenting the alternative division of natural law corresponding to the binding power of the precept in question. In a sense, only 'prohibitive' and 'prescriptive' commands constituted the necessary knowledge *per se*. Moreover, only the prohibitions were absolute commandments all the time. In respect of the prescriptions, they were binding of the occasions, when the prescription became absolute command. By comparison, permissions were neither prescribed nor prohibited. The permissive act was neither wrong to do, nor wrong to fail to do, such as entering a marriage. The advantage of Suarez division of natural law on the prohibitive,

²⁵ So man was prescribed to help those in need, but not to everybody. And man was not supposed to spent

prescriptive and permissive precepts was in the integration of all kinds of the precept in the one body of natural law. To Suarez, once the permissive precepts were in place, they would bring about the respective necessary prohibitive or prescriptive precepts. So, once man was married, he should not commit adultery, once property was divided, men should not steal. The prohibition, such as, ‘not to steal’, was, still, an absolute precept of natural law, but it would only be ‘activated’ with the division of property as far as prior the division of property nobody could steal.

2.5. Natural Right of Dominium as Permissive Natural Law

Suarez proceeded to develop the notion of natural right along the lines of the intellectualistic concept of natural law as ‘evident knowledge’. He took over Aquinas’ vision ‘consequential’ natural law of servitude and property only to reinterpret it as ‘permissive’ natural right (*ius naturale*) of *dominium*.²⁶ Natural right of *dominium* dealt with the things, dependent on human consent to it, unlike the prohibitions and prescriptions of natural law involving the necessary truth. To Suarez, ‘right’ pertained

his entire life helping them.

²⁶ Suarez’s definition of permissive natural law bore a resemblance to the early Canonist Rufinus’ definition of natural law. Tierney registered the indebtedness of Suarez’s concept of permissive natural law to the early Decretalists (Tierney, 1997, 307) In his ‘Commentary’ on Gratian’s *Decretum*, part 1, distinction1, Rufinus described natural law, as confined to men only and consisting apart of command and prohibitions, also of ‘indications’ of expediency (permissions), as to liberty and common property (see Appendix 2). But to Rufinus private property and slavery were ‘natural’ in the (paradoxical) sense of being ‘necessary’ as remedy for sin of self-love. In Tierney’s view, the idea of permissiveness was going back to Isidore ‘s distinction between human law and Divine Law (*fas*), cited in Gratian’s *Decretum*, since *fas* was used in the sense of what was permissible, or rightful, like passing through another field (Tierney, 1989, 631-632). However, the ‘indications’ introduced by Rufinus into the body of natural law were not so much ‘zones of licit use’, accordingly man’s own power of free choice, as Tierney argued, but a rather rational adaptation of the precept of natural law to the prevailing corrupt conditions of men. Thus to Rufinus, slavery, introduced as a remedy for sin, had a purpose to prepare man for the restoration of true natural law.

to the matters of justice as far as it involved the corruptible (temporal) things of human *dominium*, which could be changed by human will.

Suarez distinguished a meaning of *ius*, as a 'right', from the meaning *ius (lex)* as a law.²⁷ *Ius* [in a strict sense] referred to moral right to acquire or retain something, whether that right would involve true or merely partial *dominium*, the said *ius* would be a true subject-matter of justice (2.17.2). *Ius* thus was a right in the broad meaning of *dominium*.²⁸

The particular precepts of natural law (dealing with property and personal 'rights') constitute the natural rights of *dominium (iure naturali dominativo)* relating to *dominium* or quasi-*dominium* over a thing, as a claim to its use (2.14.16). Those natural rights of *dominium* were confined by its subject-matter to a certain condition or habitual relation of things, (in comparison to) the other (natural law) precepts for right conduct, involving the necessary truth (2.14.19). So the natural rights of *dominium* dealt with created and corruptible things. These things were characterized through nature as being subject to change (2.14.19). The created corruptible things, such as man's liberty, 'right', positively granted by nature, could be changed by human agency, since it was

²⁷ Suarez outlined the different meanings of 'law' (*ius*). Sometimes *ius* was used as synonymous with of law (*lex*), as a rule of righteous conduct, establishing certain equity in things, like *ius honestium*, or *ius legale* (2.17.2). Still in a wider meaning of *ius* referred to what whatever was fair and in harmony with reason (1.2.4). In a more strict sense *ius* referred to the equity which was due to each man as a matter of justice (1.2.4). For what was naturally just (*iustum*) was what was right according to natural reason, natural equity (*aequum*) being identical with natural justice (1.2.9).

²⁸ *Ius* (in civil law) was a right to claim (*actio*), or moral power (faculty), which every man possessed with respect to his own property (a right in a thing) or with respect to a thing which pertained to him (a right to a thing), such as right of labour to his wages, rights of servitude and of rural and urban estates, of use or enjoyment, and similar rights (1.2.5, 30-1). This *ius* too referred to a certain bond or connection born of a relationship, as applied to the moral claim (*actio*), of faculty, born of the blood relationship, such as right of kinship, or adoption, or of appointment or testament (1.2.5, 30-1).

depending either upon man's own will or upon the state with lawful power over all men and their property to the extent necessary for the right government (2.14.19).

Freedom was a matter of natural law in a positive sense, since the true *dominium* of liberty, as intrinsic 'right' to freedom, was granted to man by nature, whereas nature had not made man a slave in a positive sense (2.14.16). But though nature granted man with *dominium* of liberty, it did not absolutely prohibit it being taken away; a man as a *dominus* of his own liberty could sell or alienate it (2.14.18). Moreover through possession of higher power the commonwealth might deprive man of liberty for a just cause (2.14.18). Nature gave man the use and possession of his own life, yet he might justly be deprived of it through a human agency (ibid.).

In contrast to man's *dominium* of liberty, nature conferred upon men in common *dominium* over all things (when no division of property was made), in a negative sense and , consequently, nature gave to every man a power to use these things, though nature did not confer private property rights in connection with that *dominium* (2.14.16-7).²⁹ As long as things were not divided, natural law positively prescribed, that no one might be prohibited from the necessary use of common property, but natural law positively forbade theft, or undue taking of another property, apart of the case of extreme need, after the division of property (2.14.17).

²⁹ Suarez as if implied that common 'rights of using' somehow implied the later possessive rights.

2.5.1 Summary of Suarez on Natural Rights.

Suarez advanced Aquinas' understanding of natural law as including some things as additions, or consequences of a changed human condition. Suarez showed his intellectualistic instinct as to see as much as possible as 'natural'. To Suarez, natural law included, apart of the commands, the permissions, dealing with the corrupted things, like human *dominium*.

Suarez distinguished *ius* (as 'right') from *ius* as ('law', precept of the lawgiver) as related to the matters of human corruptible *dominium*. His 'natural rights of *dominium*' included a positive natural right to liberty and a negative natural right to private property. Natural rights of *dominium* were part of natural law, because of its correspondence to the commands of natural law. Natural rights of *dominium* constituted the permissive precepts of natural law as reflecting human condition brought about through human will. The permissive natural rights, in its turn, 'activated' the necessary commands of natural law. So the commandment of natural law 'not to steal' presupposed a natural right of private property.

Thus, man was given natural right of *dominium* over oneself, or freedom, but he could sell himself into slavery or be deprived from his freedom by human agency. Suarez treatment of slavery as result of unlimited natural *dominium* of freedom seemed to be marked by *voluntarism*. Still, Suarez' acceptance of possibility for man being deprived of natural liberty by human agency might reflect the Aristotelian vision of 'naturalness' of the subjection of parts to the whole. Although, a higher power of the human agency

could still come from man's own consent to participate in a society with such higher power.

Personal freedom carried higher natural right to Suarez than common property. In contrast to liberty, the common property was not quite positive natural right, although it was 'positively prescribed' while things were not divided. Man had a common *dominium* over the things, giving to every man power to use these things without its ownership before the division of the things. To Suarez, if even the original common *dominium* involved a 'right' to use things, it was not exclusive 'right'. He, however, assumed that the possessive 'rights' were part of natural rights of *dominium* as soon as the things were divided. Thus, Suarez failed to resolve the paradox of the original common *dominium*, where everybody had a power to use the external things and nobody was excluded. Wouldn't man, who was the first to take some fruit from a tree, have preferential right to use this fruit than anybody else?³⁰ The Roman Lawyers' insight, that property arises naturally out of private use of the things, previously in nobody's use, was lost.

The advantage of Suarez' 'natural rights of *dominium*' was in their integration into the body of natural law. Suarez's modernity was in his treatment of 'permissive' natural rights as a 'trigger' for enforcement the related prohibitive and prescriptive natural law commands. Suarez' modernity was also in the radical notion of the natural liberty, which had almost Hobbsean logic: from free volition to submission. His logic, however,

³⁰ It was left to Grotius to advance the explanation of the possessive 'rights' of *dominium* as the natural development of the original human right to appropriate things for oneself.

was not entirely voluntaristic, as it implied the dictate of intellectualistic natural law precepts over the voluntaristic ‘natural rights’ of human *dominium*.

2.6. Social Contract and the Mystical Body of Society

In the *intellectualistic* mode of thinking, Suarez, as Aquinas, adhered to the wider possible defining of the scope of natural law. As a result, he saw the private property as well as the political subjection as natural. The strange self-contradiction of Suarez was in his adoption the Aristotelian Vitoria’s concept of the naturalness political society in spite of his discard of the Aristotelian vision of natural law as natural purpose pertaining to the thing elsewhere. Suarez was dependent on Vitoria in his treatment of society as natural in his *On Law and Law-giver (De Legibus)*. He referred to the Aristotelian story of the origin of society from a domestic community to the political one.³¹ He considered society as indissoluble ‘mystical body’. To him, the power of society did not reside in men, as in ‘rough mass’, prior their gathering into society. His logic was already more subtle than Vitoria’s one. Suarez was not so bold to claim the political coercion was entirely natural. He even, with reservations, conceded to the Fathers’ view that it was a result of sin. The matters of establishing of society (as political coercion) were

³¹ Human society was twofold: imperfect (or domestic), and perfect (or political) (3.1.3). The domestic society was in the higher degree natural, arising ‘from the fellowship of man and wife, without which the human race could not be propagated’ (3.1.3). From this union followed the fellowship of children and parents, otherwise children ‘could not live, nor be fittingly reared, nor receive the proper instruction’ (3.1.3). The domestic servitude arose naturally, since men required the aid and service of the other men (ibid.).¹ Although the relation of servitude was not ‘derived not entirely from Nature, but rather through human volition’, such subjection was then obligatory by Natural Law on the ground of justice (3.1.4). However the family, though perfect for purpose of domestic government, was not self-sufficient, since no family could ‘contain within itself all the offices and arts necessary for human life’ (3.2.3). When ‘families were divided one from another peace could scarcely be preserved among men, nor could wrongs be duly averted or avenged’ (ibid.). A political society appeared, ‘when many families began to congregate into one perfect community’ by will of all who were assembled therein (3.2.3). Community was arising, when men ‘gathered together into one political body by common consent through bond of fellowship and for purpose of aiding one another to attain a single political end’ (3.2.4).

dependent on human will, and, as such, it was part of the permissive natural law. He used analogy of marriage to society, where one was free to enter but not free to leave.

There was a natural disposition of man to dwell in a community, ‘the latter necessarily requiring to be ruled by means of public power’ (3.1.12). Coercion presupposed ‘the existence of the certain amount of defection from order’, therefore coercive power was introduced in consequence of sin (3.1.12). But, though political subjection was created by intervention of human will, it was not against natural reason, but consonant with it (3.1.11).

In the nature of things all men were born free; no man had *dominium* or political jurisdiction over another; there was no reason why such power should be attributed to one man rather than another (3.2.3). The political power resided ‘not in any individual man, but rather in a whole body of mankind’ (3.2.3). But before men congregated into society political power did not reside in men, whether wholly or in part, since it did not exist in the ‘rough mass’, or (disorderly) aggregate, of mankind (3.3.1). Moreover after men had willed to gather into one community, it was not in their power to set obstacles to this jurisdiction (3.3.2). Thus political power was given to the community of mankind by the Author of nature, although not without the intervention of will and consent on the part of the human beings assembled into this perfect community (3.3.6). Likewise, the husband was the head of the wife by divine grant, but not by the will of the wife, even though they contracted the marriage by own will, they could not prevent establishment of this superiority (3.3.2). From the point of view of volition, or common consent (common will), society was a single ‘mystical body’ (3.2.4).

It would be self-contradictory for man to desire to congregate in society and to resist to become subjected to the political force, in so far as it was impossible to conceive a unified political body without political government to pursue the common good (3.2.4). Political power was given to mankind by God as a characteristic property resulting from nature through a dictate of natural reason, as a power necessary to its preservation and proper government (3.3.5). Just as a man, by the virtue of created with reason, possessed a power over himself and his faculties, i.e., was a naturally free, the political body of mankind, by virtue of its creation in its own fashion, possessed a power over itself and the faculty of self-government, and, in consequence, it possessed a power over its own members (3.3.6). Just as man could renounce his liberty (in spite of it was a natural quality of man), likewise, community could be deprived of its own power (3.3.7)³².

Despite the fact that political power resided in the community as a whole, natural law did not require that political power should be exercised directly by the agency of the whole or it should continue to reside therein, for infinite confusion and trouble would result if laws were established by the vote of every person (3.4.1). So a political power was not delegated but transferred; it was unlimitedly bestowed by the whole community to the 'supreme sources' of the power; by the latter the power could be delegated to its representatives (3.4.11). Thus, practically if the power had been transferred to the ruler, he could not be deprived of this power, since he had acquired a true ownership of it, unless he lapsed into tyranny, on which ground the kingdom might wage a just war against him (3.4.6).

³² So (in spite of the derivation from the state of Nature) quasi-moral properties, like titles of ownership,

In respect of the practical form of political community, there were three simple forms of government - monarchy, aristocracy and democracy, the particular choice of which one (or composition of them)) was defined by human will (3.4.1). Since the choice of the kind of political power of the particular society dependent upon human volition, there did not exist a universal civil law among mankind (3.4.7).

2.6.1. Summary of Suarez on political society

Our thesis is that Aristotelian vision of society as ‘natural body’ with its ‘natural purpose’ was incompatible with Suarez’ conception of natural rights of *dominium* as pertaining to the matter of the free human will. His self-contradiction was even more apparent in a view of his consistent discarding of the Aristotelian vision of ‘natural inclination’ in respect to natural law elsewhere.

Suarez’s vision of the political society was remarkably alike Vitoria’s social contract of submission. To Suarez, as to Vitoria, the contract of society coincided with the contract of government. Like Vitoria’s, Suarez’ Aristotelian analogy of the political body with the natural body presupposed an organic group-personality. So to Suarez, society was a mystical body. In his social contract of submission the whole power of society was transferred to the chosen authority. But he already had the explicit escape clause - the tyranny of the ruler. Suarez, though, elaborated Vitoria’s vision of the naturalness of society. To him, not only public power resided into the whole community, but before

or rights, could be changed by means of a contrary will (3.3.7).

community originated, this public power did not exist, since it could not exist in merely 'dispersed multitude'. Thus, he effectively conceded that political society did not exist in the state of nature.

Suarez, following his 'middle' path, also tried to accommodate the voluntaristic accent on non-predictability of human will (even if it was not strictly human will, but the will (?!) of 'mystical body'). Thus, the model for society became a marriage, which was created by the common will of man and wife, but which, as institution, they could not change. Still, the voluntaristic social contract co-existed uneasily with the Aristotelian vision of naturalness. To Suarez, in the Aristotelian fashion, a family had its natural origin in the state of nature. However, the permissive precept of natural law to marry corresponded to natural rights of human *dominium* depending upon human will. Thus, marriage as well as political society had their origin in human will (by 'social contract', though he did not use the term) after the Fall. Moreover, to Suarez, political *dominium* itself was a 'new' regulation, which did not exist in dispersed multitude (of the state of nature).

Thus, to Suarez, society was a product of natural law through the intervention of human volition. Such a position was a result of his analyses of natural law as corresponding to the binding force of the precept. To Suarez, natural law, aside of the commands, included the permissive natural rights of *dominium* corresponding to the matters of the free human will. Then the political society was, in a sense, a consequence of human will. The particular kind of political power was dependent upon human will and differed between people. Here lay Suarez' self-contradiction. By his own will, man anyway

could dispose his positive natural right to freedom for sake of political society. Why then didn't the political *dominium* reside in multitude of men? Because man, still, hold his natural right not to surrender his liberty for sake of 'mystical body' of society?

2.7. Summary of Suarez

It has been argued that Suarez enriched natural law ideas through his separation of the question of the obligation under natural law from the question of its content. Thus, Suarez demonstrated that the Scholastics were not unaware of so called 'is'-'ought' distinction.

Suarez was prepared to embrace voluntarism in order to save the core intellectualist inheritance. Overall his general stand was a kind of the intellectualised voluntarism. Suarez advanced the voluntaristic concept of law. God had His free will from eternity to create in time any law of nature. But once creating nature, as He had willed it, God would not abandon His own law. God had free will, but not irrational or self-contradictory one. In this sense God's law prohibited an evil, as inherent in nature from eternity. If He commanded to love Him, he would not change His command frivolously. Suarez had a prophetic insight, that natural law, as discerned by human reason, still depended upon a faith that God would not deceive. To Suarez, natural law was not merely a demonstration of right reason. It was the obligation, laid by the lawgiver. He almost repeated Tertullian, when he insisted that only, because man had reason, he had the Law. A law was a moral command. To follow natural law meant to abide God's will. Still, the Commandments were evident to right reason. Thus, natural law was rational, but it needed a command of the lawgiver to create obligation.

Suarez' intellectualistic side was apparent in his elaboration of Aquinas notion of natural law as evident knowledge. It embraced not only strictly self-evident truth, but all possible inferences from the evident primary principles as well. Natural law included all the Decalogue and much more. Natural law, in this sense, was a product of innate natural reason. To Suarez, by innate reason man could discern a moral quality of action, as it was assigned by God in His single act of creation from eternity. In contrast to Vitoria, Suarez was not interested in the Aristotelian vision of natural law as natural inclinations. In respect to the scope of natural law, Suarez showed a little of voluntaristic preoccupation with a divide between the conditions of intact and depraved natures. Suarez' contribution to intellectualism was in transformation of Aquinas' notion of 'consequential' natural law. He advanced a novel concept of natural law corresponding to the binding force of the precepts in place. Only the commands of natural law bound necessarily. The permissive, or concessive, natural law precepts corresponded to Aquinas' law of nations. Suarez' logic was an elaborate one. The introduction of property was not a change of natural law, since natural law did not forbid a division of property (but merely did not prescribe it in the state of nature), it was rather a change in the subject-matter, dependent upon human will. Suarez, thus, moved towards the integration of the idea of natural law as moral absolute precepts with the idea of concessive natural law as domain of free human will!

With respect of the naturalness of society, Suarez' social contract theory was very close to Vitoria's, though he already saw tyranny as a ground for dissolution of the social contract. But the Aristotelian vision of society as a natural body was an application of

Vitoria's general idea of natural law as the 'compulsive' natural inclination in respect to men's gathering in political society. Suarez was guilty of inconsistency, as far as this Aristotelian vision of 'natural inclination' did not fit into his more general framework of natural law (where the necessary commands as 'evident knowledge' were supplemented by natural rights as product of free human will).

In summary, on the question: was God's will free in creation? Suarez was with the voluntarists. On the question: what constituted obligation under natural law? he was again with the voluntarists. Only on the question: did natural law prohibit inherent evil? was he with the intellectualists.

Chapter 7

Early Modern Protestant Natural Law

The subject of this chapter is the early modern Protestant contribution to natural law ideas. Certain Protestant thinkers – such as Hooker (a moderate Anglican) or Grotius (an ‘Arminian’, a member of moderate Dutch Protestant movement) – were concerned to fend off radical Protestant (and anti-intellectualistic) voluntarism. Puritanism with its vision of irremediable corruption of man had no place for natural reason in the origin of a political society, which had been ordained merely as ‘punishment for sin’. The Puritans were even more radical in respect to the ecclesiastic society. If religion was a matter of direct and personal relation between the soul and God than the church could not be founded on any authority. According to Calvin’s doctrine of predestination the election of the man to salvation was solely an act of free grace of God without regard to human worth (Harrison, 1937, 11).

The moderate Protestants were concerned to re-establish the autonomy of human reason and, hence, man, in respect of this natural life.¹ For a remedy they looked upon

¹ Some authors have argued that the founders of the Protestantism, Luther and Calvin, were not so much against the idea of natural law, as merely discriminating between the questions of Creation and Salvation (Kirby, 1998). In this view, God, as a Creator, gave to man natural law being known by human reason and relating to the natural life. But with respect to man’s salvation God was a Redeemer, who redeemed man solely by His grace. In our view, however, such an interpretation of Protestantism, with its doctrine of predestination, leaves more questions than answers. God was a redeemer because man needed (!) to be redeemed out of his *sin*. So, to Augustine man needed salvation by grace because of the corruption of human nature as a result of the original sin. And so, to Paul grace was needed because natural life (even under the Law) inherently lacked righteousness. Moreover (to the Christians) the rewards of the future eternal life should prevail over the temporal interests of the natural life. The position on natural law then would be defined by an answer on the question: how much the natural life would promote salvation? If the election was

intellectualistic ideas of natural law. It will be argued that the moderate Protestants, such as Hooker and Grotius, each in their own way, advanced the intellectualistic idea of natural law as a demonstrative law of human reason. Thus, Hooker took over Aquinas' intellectualistic idea of natural law as 'evident knowledge. Grotius attempted to revitalise the middle Stoic intellectualistic vision of natural law as interplay of the natural inclinations to self-advantage and justice.

Nevertheless, it will be also argued that the Protestant intellectualists, such as Hooker and Grotius, were not completely immune from voluntarism. They still needed to respond to the voluntaristic charge of the intellectualistic notion of natural law as being a merely demonstrative law lacking a prescriptive force of command. This question of the source of the obligation under natural law was at the heart of the voluntaristic-intellectualistic debates. Hooker, in his own way, accommodated this voluntaristic concern. To him, due to depraved human nature, there was a need for a coercive human law of political society, in addition to natural law binding as a rule of conscience. Even Grotius had his brush with

to be merely on a base of grace, than the natural life in accordance with natural law or against it would be of no consequence (for salvation). This was essentially the Augustinian *voluntaristic* answer. The natural law of Creation as a law of intact human nature was lost. The human will became corrupt after the Fall. Instead of the original love to God man now was consumed by self-love. So there was no righteousness in the earthly temporal city of self-love. As a result the crucial *voluntaristic-intellectualistic* divide was on the question: how much was human nature corrupt? To the *intellectualist* Aquinas human reason as the *image* of God in man was not disfigured. So natural law was a demonstrative law of human reason. However, to achieve the *likeness* to God, as the perfection of the *image* of God, man needed grace. To the *intellectualists* salvation by grace presupposed the development of the *image* in man, and his life in accord with natural law before hand. To the Scholastic *voluntarists*, as Scotus or Ockham, human nature was deprived after the Fall in the sense that natural law had been subject to change as a result of the original sin. Due to this corruption of human nature, to Scotus, the Second Table of the Commandments was introduced. In comparison, in the state of grace the only necessary Commandment was to love God for His own sake. To Ockham, a conditional natural law was in place after the Fall, due to the new conditions of the private property and political government, introduced as a result of the Fall. The Scholastic *voluntarists*, with their emphasis upon free will of God, moreover, doubted the capability human reason fully to understand the creation. By claiming that the will of God was not under dictate of His reason, they also undermined the intellectualistic assumption of natural law

voluntarism. The young Grotius held the voluntaristic definition of (natural) law as God's will. The elder Grotius was careful to distinguish between natural law as a demonstrative law of reason and the volitional prescriptive divine law. Nevertheless, he still tacitly implied that man adhered to natural law out of fear of future divine punishment. He also held that the law of nations as secondary natural law was enforced through social compact.

Thus, Suarez' questions on the intellectualistic/voluntaristic divide - Was God's will free or under dictate of His reason? Was natural law a law of prescriptive God's command or of demonstrative human reason? Did the wrongdoing arise from the evil itself, or from the prohibition of the law-giver? - still could be asked.

The contribution of this chapter could be seen in outlining, firstly, the Protestant development of the intellectualistic vision of natural law as right reason, and, secondly, the ever present weakness of intellectualistic doctrines with respect of question of the source of obligation.

The first section will deal with Hooker's vision of natural law and the second will focus on Grotius' natural law concept.

as a demonstrative law of right reason binding the will. So to them, natural law was a prescriptive law of

1. The Intellectualistic Natural Law of Hooker

It will be argued here that the defender of the Elizabethan Anglicanism Richard Hooker (1554-1600) attempted in his *Laws of Ecclesiastical Polity* to revert to Aquinas' *intellectualistic* concept of natural law. However, Hooker's vision of natural law did not include the Aquinas-Vitoria idea of natural law as natural inclination. He instead took over Aquinas' concept of 'evident knowledge' as a law of right reason. Hooker advanced Aquinas' intellectualistic concept of evident knowledge by distinguishing the precepts 'known in relation to oneself' from the precepts 'known in relation to others'. The last kind of the less evident knowledge was founded on a new individualistic assumption - to make the interpersonal comparison of values possible men should account each other as equal.

To Hooker, as to Aquinas, natural law as a law of reason was still a demonstrative law of human reason. In attempting to overcome a deficiency of the *intellectualistic* concept of natural law as a rule of conscience, Hooker limited the scope for natural law 'proper'. Hooker's 'law of reason' did not include Aquinas' 'consequential' natural law dealing with the civilised conditions of private property and servitude. Instead Hooker opted for a wider scope of positive human law, which bounded through external punishment, and, which was an outcome of the social contract of a political society.

Hooker's theory of natural law represented an important transition from the Scholastic and Renaissance thought towards the new political philosophy of the 17th century. He

God's command.

developed his natural law theory in the course of his celebrated defence of the orthodoxy of the Anglican Church at the time of the Elizabethan Reformation. Puritanism had attacked the Anglican Church for its acceptance of the bishops' authority. To combat the Puritans' attack of Church authority Hooker needed to assert the Apostolic character and the continuity of the Church tradition. To succeed he relied on his *intellectualistic* vision of natural law as a law of reason, which governs any public realm either commonwealth or church. The development of natural law theory was a 'primer mover' of the whole of Hooker's approach to the defence of the Anglican orthodoxy.

Hooker also had to prove the sovereignty of the Church over its own affairs against the Catholic critics. To prove the legitimacy of political community as such, either a commonwealth or ecclesiastic community, Hooker also advanced 'social contract' theory. However, his 'social contract' theory had its roots in the voluntaristic tradition. Political society was a product of human will. Hooker's 'social contract' theory also accommodated the Protestant voluntaristic preoccupation with the deprived human nature. So the political society dependent upon the political coercion served the purpose of remedy for sin.

The particular contribution of this section will be in the outlining the specific nature of Hooker intellectualism (particularly his development of the notion of 'evident knowledge'), as well as his voluntaristic solution to the deficiency of intellectualistic concept of natural law as a rule of conscience.

1.1. Hooker's Natural Law as a Law of Reason

Hooker's novelty was in the usage of 'law of nature' as applying to irrational creatures, as well as to rational ones.² It was a departure from the traditional usage of 'law of nature' as a moral law confined only to the rational (moral) creatures, as it was understood from the Stoics to Suarez. In the later sense Hooker used term 'law of reason'.

In his treatment of natural law in *Of the Law of the Ecclesiastical Polity*, Book 1, Hooker was a close follower of St Thomas Aquinas, as Munz demonstrated by the textual comparisons (Munz, 1952, 175-93). To Hooker, a law of reason was a law by which man participated in God's eternal law governing the whole of nature as the law of nature.

Hooker, in his broad conception of law, applied the term 'law' to 'any kind of rule and canon, whereby actions are framed' (1.3.1). Law in a general sense meant 'cause', as God is the supreme cause of all things. In this sense of rational causality Universe was created and governed. Everything had its own law (1.2.6). Even God voluntarily imposed upon himself 'the first eternal law' (1.2.6). The first law of God was thus a self-prescription. 'The second eternal law' God gave to all his creatures. It governed natural agents (1.3.2 -1.3.5), as the law of nature; it governed angels as celestial law (1.4), it governed the voluntary agents, as either a law of reason or divine law of revelation, the both served as the sources for human law (1.3.1).

1.1.1. Man's *Likeness* to God as Perfection in Reason

Hooker set out to prove a dominant place of the law of reason for human life. He had no doubt that the universe's hierarchy was created rationally, ascending from natural agents, such as stones, trees, animals, to voluntary agents, such as men, angels and God himself. Reason was an attribute of human nature, so to pursue reason was to fulfil human perfection. It was in human nature to comprehend a law of reason. So to Hooker, nature (= the universe) was rational, and man was rational, so he could participate in the universal rationality.

All things sought their own perfection, which was goodness proceeding from God as supreme cause of all things. Man sought triple perfection, that was, sensual, intellectual, and spiritual or divine. The last one was achieved by supernatural means (1.11.4). The first degree of [natural] goodness was a desire for the continuance of their being. This desire was common to the both natural and to voluntary agents (1.5.2). The next degree of goodness was in *likeness* with God (1.5.2). In *likeness* [image] of God man possess a faculty of reason (1.5.3). In resemblance of God he possessed free will (1.7.3).

In summary, reason was a higher faculty of man in *likeness* to God (Hooker used '*likeness*' in place of '*image*').

² But if to the exponents of 'the new science' the Law of Nature was a conceptual alternative to the

1.1.2. Demonstrative Law of Human Reason

Hooker's law of reason was essentially a demonstrative law, binding as a rule of conscience. Reason would demonstrate the right choice of action then the will would incline man to do so.

The 'two principal fountains' of human action were knowledge and will (1.7.2). The will [as a desire of reason] was distinguished from 'inferior natural desire' which formed 'appetite' (1.7.3). Still, the irrational impulses, or appetites, made the result of man's choice uncertain (1.7.6). Reason might rightly discern the thing which was good, and yet often due to the prejudice [errors] of sensory experience the will of man might not incline itself to the known good (1.7.6). However, God designed all things to strive toward perfection (goodness) of their natures hence it was against nature to desire evil (1.7.6). Thus, apparent evil could be only desired, when it co-jointed with goodness (1.7.6). Wrong (evil) act, then, was to pursue a lesser, not a greater (higher) good (1.7.7). When reason erred, then man fall into evil and deprived himself of the general perfection (1.8.1). If reason failed to demonstrate the greater good to the will, then man would fail to make right choice (1.7.7)

In his treatment of will as ultimately faculty of reason Hooker followed Aquinas (Munz, 63). The will ruled over the irrational appetites, but still the will itself was under the rule of reason. To Hooker, unlike Ockham, only the good, which reason indicated, could be

Aristotelian substantial Forms, it was not so to Hooker (Milton, 1998, 682).

desirable to the will. Hooker was especially bold in his assertion that only the fault of reason to discern a greater good would account for wrongdoing.

1.1.3. Hooker's development of Aquinas' notion of Evident Knowledge

Hooker took over Aquinas' concept of law of reason as evident knowledge. To Aquinas, some things were 'known in themselves' and some 'in relation to something else'. To Hooker, apart of the main principles evident in themselves (in its terms), there was also less evident knowledge, either in relation to man himself or in his relation to others. Hooker advanced a new *intellectualistic* argument in favour of just, or equal, treatment of all. To see other things as equal man need to have the same measure, as when one man measured others as himself. Hooker was not an Aristotelian who measured each man by his place in the body of society. He was already an 'individualistic' *intellectualist*.

God made things (and goodness) apparent through reason. The general persuasion of all men was a sign of evident knowledge of the good. 'The general and perpetual voice of men' was 'sentence of God himself' (1.8.3.). By the light of reason God illuminated man to enable him to discern truth from falsehood, and good from evil, not 'by any extraordinary means', but 'by natural discourse' (1.8.3.). 'To make nothing evident of itself' would amount 'to take away all possibility of knowing anything' (1.8.5.). So the main principles of reason were in themselves apparent (ibid.). Some axioms or principles were more general, such as a greater good was to be choosing before a lesser one (1.8.5). Some were less general, such as, God was to be worshipped, parents were to be honoured, the others

were to be used by man as he himself wished to be used by others (1.8.5). There were the principles to obtain the less evident knowledge. The things were known either in themselves, or in mutual relation one to another. The knowledge of man was in reference unto himself, and of other things in relation unto other men (1.8.6). Observing himself, man came to see that the highest power of mind required general obedience (1.8.6). Looking into his relations with the others, man came to realise his duty to love others no less than himself (1.8.7.). In order to recognize things as equal all men should have one measure. All men being of the same nature, if man did harm, he ought to 'look to suffer', since, there was no reason why the others should show a greater measure of love to a man than he showed to them (1.8.7). The consequent rules were followed; since a man would not want to be harmed, he should not harm others; since man 'would not be in any thing extremely dealt with', he himself should avoid all extremity in his dealing (1.8.7). Hence, man ought to abstain from all violence and wrong (1.8.7).

Thus, the law of reason, commonly called the law of nature, was a law which human nature 'knoweth itself in reason universally bound unto' (1.8.9). It embraced evident knowledge (1.8.9). Such laws, concerning moral duties of man, could be 'by necessary consequence deduced out of clear and manifest principles' (1.8.11). Natural right was a right [law] which exacted general duties which concerned man naturally (1.12.1).³

Hooker's intellectualism was again apparent in his treatment of natural rights as natural law duties.

³ Hooker apparently used 'right' in the sense of 'law', and 'natural rights' meaning 'natural law'.

1.1.4. Natural Law and Corruption of Human Nature

Natural rights [natural law precepts] were contained in the Scriptures in order that the less apparent (or the more particular) things could be known, even by men, whose natural understanding was weakened (1.12.1-2). Thus, sometimes 'lewd and wicked custom' distorted the light of natural understanding (1.8.10), when a kind of general blindness had prevailed against the manifest laws of reason (1.8.11). It happened, when God as supreme cause of all things withdrew His justice, and, then, no other thing could follow (1.8.11).

Man's righteousness itself was nothing but an observance of the law of his nature, and sin was man's transgression of it (1.9.1). Man did voluntarily the one or the other (ibid). Still, some things could be done against the will 'through outward force and impulsion' or without the will 'in alienation of mind, or any the like inevitable utter absence of wit and judgement' (ibid). Nevertheless, every man in his heart and conscience knew when he did good and evil, even secretly committed and known to none but himself, because of a hope of reward or a grief of future punishment by the Author of the law of nature, Himself. (1.9.2)

Hooker's law of reason was a demonstrative law of right reason binding as a rule of conscience. Still, when the original knowledge was distorted (?), God's intervention (as the written Law) was needed. So the imperfection of fallen human nature, helped by wicked custom, sometimes could distort a natural light of wisdom. God could also somehow withdraw His justice, though Hooker did not explain why. Man could transgress a law of reason, if he was consumed by some [irrational] impulse, or being out of his mind, so

becoming blind in respect of good and evil. Also a man could sometimes lack judgement, but he would know in his heart, when he did good and evil, in so far as he knew there would be in the end God's judgment over him. Hooker's presumption of God's sanction as the motivation for a life in accordance with right reason, as well as his guess that men could lose their judgment of good and evil as a result of God's punishment went rather beyond the *intellectualistic* concept of natural law.

1.2 Hooker's Intellectualistic Natural Law and his Voluntaristic Social Contract as a Remedy for Deprived Human Nature

In spite of his intellectualism, Hooker entertained rather voluntaristic doubts in a relation to the current state of human nature. His doubt that the law of reason merely as a rule of conscience would guarantee human life in accord with natural law led him to a formulation of the voluntaristic social contract theory.

Paradoxically, an intellectualist Hooker, rather as a *voluntarist* saw the civil institutions being a remedy for depraved human nature. Civil society, originating in a social compact, was to him a remedy, not a punishment for sin. Moreover, in Hooker's view, outside and before the civil society there was no justice among men. It was not that Hooker did not see life in society as natural. To him, human society reflected the 'natural inclination' implanted into man manifesting in natural expediency for men to gather in society. Hooker, however, saw 'enforcement' of its naturalness being impossible by a law of reason only, in a view of depraved human nature. It was expedient for men to enter into the compact of

society as the protection against the injustice due to human malice. Thus, the purpose of society was to establish justice in the place of wrong. The positive laws of political society were to enforce a law of reason as well as to promote convenience.

Human society sprang from a law of human nature itself. One foundation of society was a natural inclination in men 'to seek communion and fellowship with others', because men were not self-sufficient to furnish themselves 'with a competent store of things' needful for 'a life fit for dignity of man' (1.10.1). God did not make man to be self-sufficient but to live in society.

There was yet another expedient foundation for public society, necessary on the grounds of human depravation after the Fall as a remedy for sin. In order to keep 'external order and regiment among men' the 'law politic' was established, because the inclination of 'the will of man to be inwardly obstinate, rebellious, and averse from all obedience unto the sacred laws of his nature' (1.10.1).

Hooker's message was, in a sense, in the spirit of Seneca, to whom virtue was a product of civilization. Was the past, without civil society, less evil? At least civil society had emerged to subdue evil. So, civil society was a remedy for the corrupt human nature. But how could righteousness possibly prevail if 'wickedness and malice' had taken deep roots? (1.10.3) Would not 'envy, strife, contention and violence' grow together with multitude of men? (1.10.3) Nevertheless, to Hooker, even if the present times were not perfect, still how much worse it was, when there was yet no civil society, and there were no more than eight

righteous men 'living upon the face of the earth' (1.10.3).⁴ 'To take away all such mutual grievances, injures, and wrongs, there was no other way apart of growing unto composition and agreement amongst themselves, by ordaining some kind of government public' (1.10.4.)

Thus, the only way to combat the mutual injures was to enter into the compact of society. Because of the corruption of human nature, the law of nature now required some kind of public regimentation (1.10.4.) Thus, the law of the commonwealth was 'an order expressly or secretly agreed [by men] touching the manner of their union' (1.10.1). The (positive) law of the commonwealth served to direct even the depraved nature to a right end (1.10.1.) So corrupted human nature, as a result of the Fall, ought to be taken into account by man-made law. Yet the choice of the kind of regiment was arbitrary (1.10.5.)

Positive [enacted] laws were divided upon human laws and the law of nations (1.10.9). Positive laws were different in places and times (1.10.9). Some human laws established the old duty (custom), accepted on the ground of law of reason (1.10.9). In those cases, nature itself taught laws and statutes to live by (1.10.1). Those laws should bind men absolutely, even as they had never 'any solemn agreement amongst themselves what to do, or not to do' (1.10.1). Those human laws meant to reinforce the law of reason, binding not merely in conscience, but through external punishment. In those cases the law prescribed the same

⁴ 'We all make complaint of the iniquity of our times: not unjustly, for the days are evil. But compare them with those times, wherein there were no civil societies, with those times wherein there was as yet no manner of public regiment established, with those times wherein there were not above 8 persons righteous living upon the face of the earth: and we have surely good cause to think that God hath blessed us exceedingly, and hath made us behold most happy days' (1.10.3).

thing, which reason did enforce but was not perceived to do so (1.10.10.) Other human laws ordained a new duty [not on the ground of law of reason] (ibid.). They dealt with matters not of reason but fitness and convenience (1.10.10). Human laws were made by political societies as civil, as well spiritual (as church) (1.10.11). Besides those laws concerning man as a man and man as a member of political body, there was a law concerning all such political bodies, in so far as they engaged into public commerce with one another, which was the law of nations (1.10.12). The laws of nations were the primary ones, built upon a non-corrupt 'sincere nature', such as, the embassies or the traffic of commodities, and, the secondary ones, built upon a depraved nature, such as, the laws of arms. (1.10.13)

Thus, Hooker saw human law as consisting partly of natural law, and partly in the laws suited to the conditions of the particular society. Hooker novelty was to see the law of nations as part of positive law dealing specifically with the international relations. Thus, he distinguished the international law from the civil law of the state.

Hooker, like the Stoics, assumed that men were naturally inclined to live in society. However, his explanation was not a deduction from the law of reason, but from expediency. This expediency explanation was strengthened by Hooker's preoccupation with depraved human nature (after the Fall). So, even a law of reason needed to be enforced through external punishment. Through the voluntaristic vision of political society as a remedy for sin Hooker, as if, wished to compensate for his uncompromised intellectualistic notion of natural law as merely a rule of conscience. He broadly defined human law as a law of political society suited for a corrupt nature. So even if the particular law was an inference

from the law of reason, it still needed to be enforced through the external punishment. His deep *intellectualism* was, nevertheless, apparent in his belief that the laws of reason could not to be failed to be installed as the positive laws of political society being the outcome of free human will.

1.2.1. Original and Political Dominion of Man and Voluntaristic Social Contract

It will be argued that by getting rid of the Aristotelian assumption of natural purpose of society and adopting the voluntaristic social contract theory Hooker was able to construct a consistent theory of political society. His voluntaristic social contract theory was conforming to his intellectualistic natural law concept through the assumption of a basic human law of society reflecting a law of reason, enforced through external punishment. So men, in general, could still assess the validity of a demonstrative law of reason. Still, due to the corruption of human nature some could fail to comply with it, or even to see it through. So there was a necessity of the enforcement of law of reason through the public regiment.

In contrast to Vitoria and Suarez, Hooker's social contract theory was a voluntaristic one. The Aristotelian allusion to the 'natural purpose' of political body of society was alien to Hooker. Such allusion led Suarez to assess that no power of society could reside in the dispersed multitude of men (before they joined to society). To Hooker, there was already no question that men, by their own will, entered into society, and that the whole power of society originally resided in men themselves. To him, unlike in a family, in a society men were naturally equal. Still, like Suarez, he understood society as a living corporation and

employed analogy between a contract of society and a contract of marriage. His solution was to understand a continuity of the original social contract as expressed through the existing laws of society, with which men tacitly agreed.

Hooker discussed the origin of society in the tenth chapter of Book 1, and returned to this question again in Book 8. Men subjected themselves to the authority by their own consent in the absence of God's ordinance otherwise. The original compact established a society as a living corporation. This compact continued to be in place unless revoked by common agreement. The original compact, even if forgotten, still manifested itself through the positive laws. The laws were made on a behalf of society by its representatives, who determined the particular rewards and punishment for the natural goods and evils. The people themselves chose their ruler, but after they had chosen the sovereign, they put themselves under his rule. Still, the sovereign, too, was under the law as a keeper of the law.

1.2.2. Society as Living Corporation

A power was that ability, which man had of himself or received from others for the performance of any action (8.2.1). Before any form of government was established, every independent multitude had a full dominion [*dominium*] over itself. (8.3.1). God created men with a full power to choose in what kind of society to live (8.3.1). And yet man, which was 'born Lord of himself might be made another's servant' (8.2.1). The power, which no one could overrule, was a supreme dominion of the sovereign (8.2.1). Sometimes multitudes

were brought in subjection to the ruler by force (8.3.1). Sometimes the ruler was appointed directly by God (ibid.). [Otherwise] men themselves established the [public] power and appointed somebody as a ruler (8.3.1).⁵

At first, when numbers of households, ruled by the fathers as by kings, were joined into civil society together, the kings, originally chosen from the fathers of families, were the first governors (1.10.4.). The lawful power was granted to the wise men either by a consent of men, since the wise men did not have ‘natural superiority of fathers’, or by a direct appointment of God (1.10.4). To be commanded men [prior] consented to participate in the society, which men were part of ‘at any time before consented, without revoking the same after by the like universal agreement’. (1.10.8) As with man, while he was living he conceded to his past deeds, society, once established as corporation, would continue to live in the successors of the original participants. In this sense corporations were immortal (ibid.).⁶

An original compact was a cause of the ruler’s dependency in his power upon the [public] body (8.3.3). Nevertheless, the compact could be dissolved only with the supreme governor’s consent (8.3.3). The divine law did give a ruler a right, once ‘exalted to that estate’, to exact the general obedience of their subjects (8. 3.1). Likewise ‘the law appointeth no man to be an husband, but if a man have betaken himself into that condition,

⁵ There were three ways to have the supreme dominion: by conquest, by God’s special appointment, and by (popular) agreement (8.3.3).

⁶ ‘As any man’s deed past is good as long as himself continueth: so the act of a public society of men done five hundred years since standeth as theirs, who presently are of the same societies, because corporations are immoral: we were then alive in our predecessors, and they in their successors do live still’ (1.10.8).

it giveth him then authority over his own wife' (8.3.1). In the case of the kingdom, where people were in no subjection but willingly agreed upon the power of the king, the kings even by inheritance held 'their right to the power of dominion with dependency upon the whole entire body politic' (8.3.2)

To Hooker, a society was a living corporation coming to existence by common consent. He, however, was less certain on question how it could be dissolved. He mentioned two possibly contradictory clauses, such as, a consent of the people, and, a consent of the ruler.

1.2.3. Laws of Political Society as a Manifestation of the Original Compact

The social compact was manifested not so much through the original compact, which could be beyond knowledge with the passing of time, but rather through the positive laws and custom (8.3.3).

Initially the kings ruled at their discretion. People then recognised 'that to live by one man's will, became the cause of all men's misery' (1.10.5). Thus, the law were set contained what were naturally good or evil, to constrain men's will and to set their duties and penalties of transgressing the duties (1.10.5). Since greater part of men valued their own private good above all, as well as the sensual good above the divine good, the laws naturally meant to reward virtue and punish vice (1.10.6). The particular determination of reward and punishment belonged to those men, who making the laws (1.10.6.) So, a theft was naturally punishable, but the kind of punish was positive (1.10.6.). Only the wise men

were to be admitted to devise law but ‘all men shall be forced to obey’ (1.10.7). The laws ought to be made with a public approbation, which could be through the representatives on men’s behalf, but in many [cases] assent was given implicitly [tacitly] (1.10.8). Still the ‘lawful power of making laws to command whole politic society belongeth so properly unto the same entire societies’ (1.10.8). In the case of the Parliament of England, it ‘together with Convocation’ represented ‘the very essence of all government within this kingdom’, as they were the makers of the laws; but the laws, being made, did receive their force ‘from power which the whole body of this Realm’ (8.6.11). In respect to authority of making law, the power of a king rested ‘principally in the strength of a negative voice’ (8.6.11). The power of a king over all and in all was limited by the law (8.3.3).

In summary, society was a living corporation (not unlike Suarez’ mystical body). The origin of society lay in the historical social compact, which taken place the generations ago. Hooker, like Suarez, used an analogy with a contract of marriage, where a wife voluntarily submitted to the authority of a husband. The continuity of the social compact was achieved through the established institutions of society (as the parliamentary system of representation). Thus, the kings were guardians, rather than makers, of the laws and the institutions were representing the society as whole. The original compact as if was renewed through the present laws of the society. The laws were made by a society through its representatives. Thus, for Hooker, the compact of society was, essentially, in the two stages. Firstly, men originally gathered into a society, and, then, they made its laws. Still, he rather hesitated to give men an option of the voluntary dissolution of society without

consent of the ruler. Possibly, because in his social compact a ruler was mostly a guardian, not a maker of the laws, Hooker was less concerned with the possibility of tyranny.

1.3. Summary of Hooker

This section focussed on a specific character of Hooker's intellectualism as a law of reason, as well as his voluntaristic response to the weakness of intellectualistic notion of natural law as a rule of conscience. It had been argued that Hooker preserved intellectualism, but at cost, conceding a part of the prerogative to a free human will.

Hooker in his defence of the moderate Anglicanism advanced the intellectualistic concept of natural law as a law of right reason, or evident knowledge. Hooker's natural law, penetrating the whole nature, was, in a sense, as intellectualistic as it could possibly be. He hold the intellectualistic vision of natural law, which governed men as the law of reason, and which governed irrationals and the rest of creation as the law of nature. Hooker's intellectualistic vision, however, had nothing to do with Aquinas-Vitoria's concept of natural law as 'natural inclination'. Hooker's intellectualistic concept of evident knowledge was rather limited in its scope in comparison with Aquinas' one. His concept of the law of reason, as pertaining to man, was confined to the most evident general precepts of reason. Hooker also attempted to strengthen Aquinas's concept of evident knowledge by taking over Aquinas' distinction between a thing 'known in itself' versus 'known in relation to other things', and transforming it into a distinction between man's knowledge 'in relation to himself' and 'in relation to others'. To make the interpersonal comparison of value

possible man should treat others as oneself. So Hooker attempted to construct a 'subjective' intellectualistic concept of 'just', or 'right', thing. It was right, or just, not to injure others, because it followed from the law of reason, if in his mind man would put oneself in another's place. Unsurprisingly, Hooker used the term 'natural rights' in the sense of man's duties in relation to natural law.

Hooker, however, surprisingly for an intellectualist, effectively conceded a fear of the punishment as a condition of obeying a law of reason. Moreover, he attempted to overcome the weakness of the intellectualistic concept of natural law as a rule of conscience by adopting a voluntaristic notion of human (man-made) law. In comparison with the Aristotelians, like Vitoria, the Fall had a voluntaristic significance for him. He used the Fall as an explanation of the institutions of corrupt human nature. He departed from intellectualism by admitting a need for the prescriptive voluntaristic laws in order to ensure the obedience of those, whose reason was clouded after the Fall. Still, he saw the Fall in the intellectualistic light, as a failure to discern the law of reason.

Thus, in spite of the subscribing to 'naturalness' of society, Hooker effectively moved his social contract out of state of nature. Aquinas' 'consequential' natural law of civilised society, with private property or servitude, was no part of Hooker's law of reason. Still, to Hooker, society was not against the law of reason, but for the protection of it. The organised body of society would discern and agree on just laws more readily than the scattered men. In the condition of corrupt human nature it was also expedient for men to enter into social contract in order to preserve peaceful life.

Hooker implicitly used a notion of dominion (*dominium*) as a 'power to act' in his explanation of the social compact to choose a ruler. Before any government took place man had full *dominium* over himself. Men surrendered a part of the original *dominium* to grant a chosen ruler his sovereign power. Society originated by social compact, since men, who joined in the society, were naturally equal, unlike men in a family (where fathers had the natural supreme power). In contrast to Suarez, or Vitoria, to Hooker, the political *dominium* was not a new power ordained by God, but emerged at the expense of power, which originally resided with men themselves. Yet another originality of Hooker was to see a compact of society as involving not only the setting of the ruler, but the setting of the laws too, with a ruler being merely a keeper of the laws. The fundamental laws of society were inferred from the law of reason by the chosen wise men and enforced by the sanction of the positive law. The current political society derived its legitimacy from the original social contract taken place the generations ago, but was renewed through the continuous law-making.

In summary, in his response to the question, 'was God's will free or under dictate of intellect?', Hooker was the intellectualist. In his answer to the question, 'did natural law prohibit inherent evil?', he was also with the intellectualists. On the question 'What did constitute obligation under Natural Law?' he, again, gave the intellectualistic answer. It was still right reason as a rule of conscience. However, he already had his doubts about human nature: he was with the voluntarists on the question of the significance of the Fall. Although, he did not present the intellectualistic explanation of corruption of rational nature

after the Fall. Instead, he advanced the voluntaristic concept of society as a product of human will for reinforcement of the law of reason and remedy for human fallen nature.

7.2. Grotius: A Reformed Stoic Intellectualism?

One of the most famous Protestant writers on natural law was Hugo Grotius [1583 -1645], the ‘miracle of Holland’. Hugo Grotius was renowned for his defence of the Dutch position in its trade war against the Portuguese in his youthful pamphlet ‘For the Freedom of the Sea’ (1609).⁷ Grotius was a supporter of the Arminianism, the moderate Protestant movement, and opposed to the radical Calvinism. Through his adherence to the ideas of natural law, he, like Hooker, distanced himself from the radical Protestant concept of predestination. In addition, as Tuck pointed out, Grotius writings were possibly also directed against the emergent Scepticism of the end of sixteen and beginning of the seventeenth century (Tuck, 1983, 43-49).⁸

Grotius’ position towards natural law shifted during his life time. He began with rather voluntaristic notion of law as defined by the will of the law-giver. In his early, radically inclined, *De Jure Praedae Commentarius*, The Commentary on the Law of Prize and Booty (CLPB), (1604) he emphasised the inclination to self-preservation at the root of natural law, at the expense of the inclination to justice. In a contrast, in his mature work *De Jure Belli ac*

⁷ It consisted of Chapter 12 of the then unpublished *Commentary on the Laws of Prize and Booty* (CLPB).

⁸ Ian Hunter brought into the attention a praise bestowed upon Grotius by the later natural lawyers, such as Thomasius, for his separation of divine, universal, mosaic, and human laws from each other, as leading a way to ‘desacralisation’ of the laws of social life, as well as a critique of Grotius, for example, by Pufendorf, for

Pacis Libri Tres, *On the Law of War and Peace* (LWP) (1625), he put more emphasis on the natural sociability of man. Man's natural inclination to live in society reflected man's rationality. Due to his possession of reason man was able to discern what was just. Grotius' ultimate optimism in respect to human nature brought forward his famous intellectualistic definition of natural law as the dictate of reason, which could not be changed even by God Himself. It will be, hence, argued that Grotius contribution to intellectualism was to abandon the broad Aristotelian notion of natural law as 'natural purpose' in favour of the middle Stoic notion of natural law as a trade-off between self-advantage and justice. Grotius' indebtedness to Stoicism was especially apparent in his presumption of the natural inclination to sociability, i.e. justice, alongside with the inclination to self-advantage (self-preservation). So, in contrast to opinion of Tuck, it will be argued, that to the mature Grotius, unlike Hobbes, the inclination to self-preservation alone could not provide feasible foundation for natural law theory.⁹

The whole ground for Grotius' optimism was a Christian belief in God's will to create man with a nature inclined to human fellowship. Still, Grotius was not unaware of the distinction between questions about the content of natural law and the enforcement of natural law obligations. Hence, it also will be argued, that even Grotius' late intellectualism had its brush with voluntarism. Grotius implicitly presumed the fear God's punishment as a source of adherence to natural law. Grotius voluntaristic emphasis of enforcement of obligation was also apparent in his vision of social compact as the law of nations.

still clinging to the 'transcendental-rationalist' line in his assertion of rational validity of natural law (Hunter, 87-9, 177-8)

2.1. Voluntaristic Law as God's Will

The young Grotius' assumption of man's natural liberty had its roots in the voluntaristic notion of law. In the beginning of Chapter 2 of *the Commentary* Grotius endorsed the voluntaristic view that a given thing was just because God willed it, rather than that God willed the thing because it was just (*CLPB* 2, 8). In this chapter Grotius formulated rules of making the law, as arising from the will of law-giver. Thus, divine [natural] law was that which God had shown to be His will (*ibid.*). [Law as] an act of commandment was a function of power, and primary power over all things pertained to God since power over his own handiwork belonged 'to the artificer and power over inferiors, to their superiors' (*ibid.*)

Thus, the law with respect of man was that which he indicated was his will (*CLPB* 2, 18). Natural liberty was a power of man to act in accordance with his own will (*CLPB* 2, 18).

The young Grotius insisted on the voluntaristic understanding of law as received from the law-giver. Grotius used the voluntaristic notion of law as 'function of power' to reassess the will of man as a law to himself.

2.2. Natural Law of Self-Preservation

⁹ Tuck argued that Grotius, like Hobbes, attempted to construct a minimalist 'Natural law' of self-preservation (Tuck, 1983, 60).

To Grotius, there was natural law of self-preservation, implanted in man by God. So the retaliation of force by force was just as natural, as was striving for one's own advantage.

Since God fashioned creation and willed its existence every individual nature received from Him certain natural properties to preserve its existence and to guide it for its own good in conformity with 'the fundamental law inherent in its origin' (*CLPB* 2, 9). All duties consisted in the things which pertained to the self, as goods or evils, indicated by mental attitudes of desire and aversion, implanted by Nature in all living creatures (*CLPB* 2, 10). Some of these things man could 'either bestow upon or take from other men', depending upon how much man owed to himself and how much to his fellow man (*ibid.*). There were two classes of things which concerned man. The first was concerned with the body, that was, among the evils being disease, mutilation of members and death; that was, among of the goods being a life with the whole and able body. The second dealt with things outside of man himself, but, nevertheless, beneficial, such as 'honour, riches, pleasure', or injurious, such as, 'infamy, poverty, pain' (*ibid.*).

To Grotius, the acquisition of things was, essentially, the natural development of the original *dominium* of man over himself and over the external things (although, he did not use term 'original, or natural, *dominium*'). Inferior things were given (by God) for use by their superior (plants for beasts, beasts for men) (*CLPB* 2,11). God bestowed these things upon all men in general (*CLPB* 2,11; 12, 228). Man, by his corporeal nature, was made able

to acquire things. Man being a corporeal entity, other bodies were naturally able to benefit or injure him (*CLPB* 2,11).

In a marked contrast to Ockham (and more boldly than Vitoria), Grotius claimed that for man the power to acquire things was part of the original bestowal, i.e. his nature as created by God. To him, [natural] liberty in regard of action was equivalent to ownership in regard to property (*CLPB* 2, 18). Still, there was no private property as such under the law of nature (*CLPB* 12, 227). Nevertheless, a certain form of ownership (*dominium*) did exist, though it was ownership in a universal and undefined sense (*CPLB* 12, 228).¹⁰ But this gift (bestowed upon men) ‘could be turned to use only through acquisition of possession’ (*possessio*, the forerunner of *usus*, and subsequently *dominium*) (*CLPB* 2, 11). So the distinction in ownership (*dominium*) was ‘the result of a gradual process whose initial steps were taken under the guidance of nature herself’ (*CLPB* 12, 228). Some things were consumed by use, such as, food and drink, and belonged to a given man in the sense of private possession (*CLPB* 12, 228). Then things, such as, clothes, and the other things capable of being moved or of moving themselves, became a private possession too (*ibid.*). Afterwards, it was not even possible for all immovable things (like fields) to remain non-appropriated since the use of these things was bound up with consumption, and since there were not enough immovable for indiscriminate use by all men (*CLPB* 12, 228). So the private possession arose through occupation (*occupatio*) (*CLPB* 12, 229). Though the things, which unable to be occupied, or the things, which could be used by all without discrimination, such as, running water, were common to all (*CLPB* 12, 230-1).

¹⁰ There was nothing to prevent a number of men from being ‘joint owners’ of one and the same ‘possession’ (*CLPB* 12, 228).

To the mature Grotius, as well, the use of things in common was in accordance with the law of nature, as far as ownership by men was not introduced; and the right to use force in obtaining one's own existed before the [civil] laws were promulgated (*LWP* 1.1.10.7.) Further, the law of nature dealt not only with things outside the domain of the human will, but also with many things which resulted from human will (*LWP* 1.1.10.4). So ownership was introduced by the will of man, but, once introduced, the law of nature protected it by prohibition of theft (*LWP* 1.1.10.4).

Grotius, thus, provided an explanation for the natural origin of *dominium* of private property in terms of the natural extension of original *dominium* over himself and over the external things, as reflection of natural power ('use-right') to acquire things.¹¹ His explanation was very much in the line with Gaius' vision of natural arising property when no injury was done. Grotius, though, already saw a correlation between notions of '*dominium*' and 'right'. So the [natural] 'right' of using was originally acquired through a physical act of attachment (*CLPB* 12, 229). To the mature Grotius, 'right' had a very broad meaning of *dominium*, as corporeal and incorporeal claim over oneself, children, property, or as some sort of obligation of others.¹² This broad meaning of 'right' as any possessive claim essentially coincided with a broad meaning of *dominium* as licit power (though,

¹¹ Buckle had noted the genesis of Grotius' notion of *dominium* from the original 'use-right' (Buckle, 1991, 11-13).

¹² Law, among other meanings, also meant 'a body of rights', referred to a man, growing out of (law as a rule of action), becoming 'a moral quality of a person, making it possible to have or to do something lawfully' (*LWP* 1.1.4.). Legal right was a perfect moral quality in 'the range of natural things' corresponded to 'act' (*LWP* 1.1.4.). Legal right, or faculty, being a right to one's own, divided into powers, included power over oneself, or freedom; power over others (as of the father and master over the slaves); property rights, either absolute, or less than absolute (as usufruct and the right of pledge); and contractual rights (*LWP* 1.1.5.) Such a

Grotius usually used '*dominium*' in narrow sense as a full ownership). The broadly understood *dominium* conferred on man a licit moral power to do something. Then natural law was to be, in its essence, a law, which protected (natural) rights of natural *dominium* (although, Grotius himself did not use the term 'natural right').¹³ To acquire things at his will and without injury (!) to others, then, was to be man's natural right. Grotius' defence of the natural right of using as arising from man's natural *dominium* over himself and the natural inclination to self-advantage reminded Gaius' defence of naturalness of property from occupation rather than Aquinas' explanation of property out of expediency.

Hence, from the natural division of things into beneficial and injurious, the two precepts related to one's own Good in the Law of Nature followed. It was permissible to defend one's own life and to shun that which threatened to prove injurious (*CLPB* 2.10). It was permissible to acquire for oneself and to retain the things useful for life (*ibid.*).¹⁴

Years later in the *Laws* Grotius again included natural inclination to self-advantage under the law of nature, as in the *Commentary*,. But he now stressed that it should not be injurious to others. It was not contrary to the nature of society to look out for self-advantage, provided that 'right' of others were not infringed, consequently, the use of force, which did not violate 'rights' of others, was not unjust (*LWP* 1.2.1.6.).

right attached to a man, even if it followed the thing (being 'real right' in contrast to 'personal right'), in the sense being attached to the (particular) man, who was entitled to a certain thing (*LWP* 1.1.4.).

¹³ Buckle noted Grotius' law of Nature related to defence of one's own *suum*, which related to notion of 'use-right' (Buckle, 1991, 29-30)

¹⁴ The first law was 'put into practice through the repulsion of one body from another and the second law, through the attachment of one body to another (*CLPB* 2, 11). So the lower animals were given their corporeal members and men were given hands and feet, 'as instruments for the two function of repealing and attachment' (*ibid.*).

2.3. Rules of Justice reflecting Natural Inclination to Society

Throughout all his life Grotius maintained, with the Stoics, and against the Sceptics, that there was a natural inclination in human nature to have a rational regard for one's fellows. To Grotius, young or old, natural law was the interplay of two natural inclinations: to self-advantage and to social life. But if the young Grotius emphasised the first one, the mature Grotius' focus was on the second one. Grotius of *The Commentary on Law of Price and Booty* was (strangely) of a more sceptical opinion about human nature than the much endured Grotius of twenty years older when he wrote *On the Law of War and Peace*. The mature Grotius endeavoured to construct the intellectualistic theory of natural law as dictate of right reason accommodating man's inclination to live in society. To the mature Grotius human reason itself was manifestation of inclination of human nature to live in society.

Even for the young Grotius, besides caring for himself, man was also commended by God to care for 'the welfare of his fellow beings, in such a way that might be liked in mutual harmony as if by an everlasting covenant' (*CLPB* 2, 11). Love was twofold for oneself (desire) and for others (friendliness); with latter burned most brightly in man, 'endowed not only with the affections shared in common with other creatures, but also with the sovereign attribute of reason' in the image of God' (*CLPB* 2, 11-2). Natural inclination impelling men toward living in society was the source of reciprocity of one's own good and ills with the goods and ills of others (*CLPB* 2, 14). So by his rational faculty man could perceive justice in relation between men. Man's rational faculty, though 'beclouded by human vice', still clearly manifested itself, 'especially in the mutual accords of nations' (*CLPB* 2, 12). Since

universal concord could exist only in relation to that which was good and true, the [primary] law [of nations], then, was what the common consent of mankind had shown to be the will of all (ibid.).

To the younger Grotius, as to Seneca (e.g. *On Anger* 2.31[7-8]), society was kept safe from harm by love and watchful care for its component parts (*CLPB* 2, 13). Hence, the two precepts of the [secondary] law of nature [or the primary law of nations], related to the goods of others, were of inoffensiveness and of abstinence (ibid.). Let no one inflict injury upon another (ibid.). Let no one seize possession of that which had been taken into possession of another (ibid.) As result of the former a life was rendered secure; as result of the later a law and distinctions of ownership arose together with notion of Mine and Thine (*CLPB* 2, 13-4). Then two precept of the law [of nations] arose, related to justice in regard to all men, which weighted things and acts without regard for persons. (*CLPB* 2, 15) Evil deeds should be corrected. Good deeds should be recompensed (ibid.).

The author of the law of nature dictating self-preservation also impelled men to live (justly) in society.¹⁵ To the young Grotius, society was natural. God commanded a man to care not only about his own safety, but also about the welfare of his fellow men, in such a way that all were linked into mutual harmony as if by everlasting covenant (*CLPB* 2, 11)

To the mature Grotius of the *Laws*, the ‘maintenance of the social order’, consonant with reason, was a source of the law [of nature] that dictated to abstain from that, which was

¹⁵ Grotius’ argument from ‘design’ was noted by Buckle (Buckle, *Natural Law and Theory of Property*, 24)

another's; and, to restore to another anything of his which one might have together with any gain received from it; to fulfil promises; to make good of a loss incurred through man's fault; and to inflict the penalties upon man according to his deserts (*LWP prol. 8*).

Grotius now reiterated 'an impelling desire for society', peaceful and organised according to reason (*LWP prol. 6.*). Grotius, moreover, openly denied, that in respect to man, it was possible to assert that he only inclined to his own advantage (*ibid.*). The very nature of man, which would lead him into the mutual relation of society, even if he had no lack of anything, was 'the mother of the law of nature' (*prol. 16.*) Man's desire for society was gratified by man's possession of 'speech, and the faculty of knowing and acting in accordance with general principles' (*prol. 7.*). In comparison with other animals, man had not only a strong bent towards a social life, but also 'a power of discrimination', which enabled him to decide what things (related to present as well as to future) were agreeable or harmful, 'being neither led astray by fear or the allurements of immediate pleasure, nor carried away by rash impulse' (*prol. 9.*)

To the young Grotius, besides, due to the corruption of human nature men needed to protect themselves against wrongdoings by mutual agreement. The need for remedy by establishing the law of human society arose because of men of corrupt nature, who either failed to meet their obligations, or even assailed the fortunes and the very lives of others without suffering punishment (*CLPB 2,19*). Society was then formed by common agreement for self-protection and assistance of the necessities of life. Therefore, the lesser units began to gather men into one locality in order to fortify the universal society, which linked men as

whole, by a more dependable means of protection and with a purpose of bringing together the different products of many men's labour, which were required for the use of human life (*CLPB* 2, 19).

To the mature Grotius, likewise, there was a place for human volition in the establishment of society. It was in man's own interests, in order to be better provided with necessities to be congregated in society. The law of nature had reinforcement of expediency; for the Author of nature willed that men were weak and lacked many things in order to be inclined to the social life (*LWP prol.*16). Expediency afforded an opportunity also for the law since society and subjection to authority had their roots in expediency (*LWP prol.* 16.).

So, the commonwealth was formed by a general agreement [of men joining into it] for self-protection through mutual aid and for equal acquisition of the necessities of life, which of its members were citizens (*CLPB* 2, 20). Apart from the initial participation in the compact, man tacitly entered into it by attaching himself to the political society, which was 'united and permanent body'. The will of men also manifested itself either in the formal acceptance of pacts, as was originally the case, or in tacit indication of consent as in later times, when each man attached himself to the body of commonwealth, that had already been established (*CLPB* 2, 20).¹⁶ It was by the law of nature, that men should abide pacts, because it was necessary that men could place themselves under mutual obligations (*LWP prol.*15). To Grotius, the common consent was a 'sign' of the law of nature. The 'mother' of civil law

¹⁶ 'Those who had associated themselves with some group, or had subjected themselves to a man or to men, had either expressly promised, or from the nature of the transaction must be understood impliedly to have

[regulated relations of men as citizen] was obligation which arose from mutual consent and derived its force from the law of nature (*LWP prol. 16*).¹⁷

Grotius' inclusive definition of natural law blurred its distinction from the law of nations. In comparison with the law of nature, the law of nations could not be deduced from the common principles by sole reason. It was agreed upon by common consent, but still it reflected the shared reason. The 'secondary law of nature' of the *Commentary* became the [primary] law of nations in the *Law of War and Peace*.

The proof that something was according to the law of nature was *a priori* by demonstrating the necessary agreement or disagreement with a rational and social nature (*LWP 1.1.12.1*). It was also *a posteriori* by concluding, that something was believed to be such among all nations, or among all those more advanced in civilization (*ibid.*). For the universal effect demanded the universal cause, with the cause of the universal opinion being the common sense of mankind (*1.1.12.1*).

The law of nations, clearly observed everywhere by the common consent and having its origin in free will of men, differed from the law of nature, being 'correct conclusion drawn from principles of nature', (*prol. 40*). The law of nations consisted of 'truly and in all respect law' and 'a kind outward effect simulating that primitive law (*prol. 41*). By the

promised, that they would conform to that which should have been determined, in one case by the majority, in the other by those upon whom authority had been conferred (*LWP prol.15*.)

¹⁷ A municipal [civil] law, regulated relations of men as citizen, was that which the commonwealth had indicated to be its will (*CLPB 2, 23*). There were laws peculiar to the civil covenant: Individual citizens should not only refrain from injuring other citizen, but should protect them, both as a whole and as individual men; Citizens should not only refrain from seizing one another's possessions, whether these be held privately

mutual consent 'certain laws should originate between all states, or great many states', as the law of nations, having in view the advantage of 'the great society of states' (*prol.* 17.)

Grotius' Stoic allegiance was apparent in his contrast of natural law with expediency. The expediency explanation of society - in terms of man's weakness - was not taken by Grotius in the Aristotelian sense of 'natural purpose' of body of society. To Grotius, the naturalness lay ultimately not in natural expediency, but in man's natural love for each others. The corrupt character human nature, however, reinforced the considerations of expediency. The compact of society served to enforce the law of nations. The law of nations was manifested in the social compact by means of the common consent. Grotius' vision of social compact as a sign of the shared dictate of reason was a rather natural output of his Stoic-inclined intellectualism.

2.4. Between Intellectualism and Voluntarism

The young Grotius was not only aware, but adhered, to the voluntaristic definition of law as command. The mature Grotius, still, contemplated whether a law would fail of its outward effect unless it had sanction behind it (*LWP prol.* 19). But he now argued that a law even without (external) sanction was not entirely void of effect (*LWP prol.*20). Still, his argument was marked by voluntarism. For justice brought a peace of conscience, while injustice caused 'torments and anguish'. But, most important of all, God reserved His 'judgement for the life after this, yet in such a way', that He often caused 'their effects to

or in common, but should furthermore contribute both that, which was necessary to other men, and that, which was necessary to the whole (*CLPB* 2, 21).

become manifest even in this life' (id., 20). Grotius, as if, considered that his intellectualistic natural law would effectively lack force without a voluntaristic presumption of the last judgement by God.

To Grotius, besides the source in the free will of God, there was another source of natural law in nature. In the *Law of War and Peace*, Grotius attempted to distinguish the voluntaristic notion of law as command from the intellectualistic notion of law as dictate of right reason.

The law of nature could be attributed to God, because of His having willed that some 'essential traits' existed in man (*LWP prol.* 12.). Grotius distinguished natural law from divine law. In contrast with the law of nature, the volitional divine law by forbidding things made them unlawful and by commanding things it made them obligatory (*LWP* 1.1.10.2) In this sense the Decalogue was the volitional divine law (although its precepts could coincide with the law of nature) (*LWP* 1.1.16-7). As Tuck noted, to the mature Grotius natural law did not contain the whole Decalogue, but omitted, for example, the prohibition on idolatry (Tuck, 1983, 57).

However, Grotius' notion of natural law partly overlapped with his notion of volitional law. So to him, the things, in regard to which the law of nature had been ordained, sometimes could undergo a change [though, not the law of nature itself]. So if God's commanded 'that any one be slain or that the property of any one be carried off', it was not that homicide or theft, ' words, connoting moral wrong' became permissible, but it, instead, was not to be a

case of homicide and theft (*LWP* 1.1.10.6.). As if, for Grotius, as for Ockham, the evil was connoted by the words themselves. But if God commanded the deed, it could not be ‘murder’ or ‘theft’, the words connoting moral wrongs.

Nevertheless, Grotius formally defined natural law in the unmistakably intellectualistic terms. The law of nature was unchangeable – even in the sense that it could not be changed by God. Just as even God could not cause ‘that two times two should not make four’, so He could not cause that which was ‘intrinsically evil be not evil’ (*LWP* 1.1.10.5.). Grotius famously said, that judgement of human reason ‘would have degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men were no concern to Him’ (*LWP prol.* 11.). The principles of natural law were in themselves manifest and clear, almost as evident as those things perceived by the external senses (*LWP prol.* 39.). The law of nature was a dictate of right reason, which grasped acts as necessarily forbidden, or enjoined, by the Author of nature in accord with their moral baseness or goodness (*LWP* 1.1.10.1.)

Grotius’ intellectualism attempted to breach the divide between early and middle Stoicism. To him, as to Scotus, the dictate of right reason was to define rules of justice, as natural law, for moderation the pursuit of advantage. To Grotius, like to Gaius, natural law was a dictate of human reason and as such was confined to men. So the distinction made by the Roman lawyers [as Ulpian] between the law of nature as common to animals and men, and the law of nations as peculiar to man, was ‘of hardly any value’ (*LWP* 1.1.11.1). Whether an act, in regard to which the law of nature had pronounced, was common to men and other

animals, such as the rearing of offspring, or peculiar to men, such as the worship of God, had 'no bearing whatever on the nature of the law' (*LWP* 1.1.11.2).

Thus, even the mature Grotius held the (paradoxically) voluntaristic flavoured Stoic notion of Natural Law. God implanted in man, aside from inclination to self- preservation, an inclination to justice as Right Reason. It was like the middle Stoic vision of Natural Law. But in comparison with the middle Stoics, Grotius defended the naturalness of justice by the voluntaristic appeal to God's will. The mature Grotius, moreover, attempted to separate Natural Law from God's volitional law. He declared the Natural Law of preservation of man and human society to be a dictate of human reason. Grotius now asserted the rationality of Natural Law even in the absence God to underpin it by His Will. Still, his intellectualistic assertion of Natural Law was, however, only possible, as it was with the Stoics, with a belief into the reasonableness of Nature at whole. With the difference that Grotius happened to believe not in the Stoic Pantheistic Nature but in God's created rational human nature.

2.5. Summary of Grotius

This section had its main task to underline the Stoic credentials of Grotius. It had been argued that Grotius attempted to assimilate the middle Stoic vision of natural law through two inclinations to self-advantage and justice to the original Stoic concept of natural law as dictate of right reason. Grotius' solution (alike the one of Scotus) was to define natural law as dictate of right reason moderating the natural inclination to self-advantage. However, to Grotius, the rules of justice were dictated by of fully autonomous human reason

(uninfluenced by the higher will). Yet another emphasis of the section was on the deficiency of straight-forward Grotius' intellectualism in respect to enforcement of the obligation under natural law. The only remedy to this inherent weakness to the intellectualistic demonstrative notion of law, which Grotius had to offer, was to complement it with the voluntaristic prescriptive notion of law in one sense or another.

In his *Commentary* Grotius advanced a theory of natural law from God's dispensation. It was God's will to implant self-love, as well as a love to others, into men in order to achieve mutual harmony. This point was made especially clear in the *Law of War and Peace*. Grotius declared natural law, which protected the mutual preservation of men in society, to be a dictate of right reason. Grotius, indeed, attempted to discern by reason the most basic rules of life in society. However, in contrast to Hobbes, but in accord with Grotius' Stoic affiliations, his appeal was not only to self-preservation, but also to the natural sociability of men. But while the Stoics believed in nature pervading by reason (*logos*), Grotius, as a Christian, believed in man made with reason by God. While the Middle Stoa struggled to provide a justification for inclination to justice alongside with inclination to self-preservation, Grotius believed that it was God's will to make man like that. His famous expression, that even without God natural law would stay, meant that the content of natural law related to prohibiting the inherent evil and prescribing the inherent good. Grotius, thus, wanted to distinguish the law of nature, as discerned by reason, from the volitional divine law, known by revelation. However, without God there could be no obligation and, hence, no reason to follow natural law. Unless he had faith in God, Grotius could not concede that man would follow natural law at least out of fear of God's punishment. If Grotius did not

believe in God, as an Author of nature, he could not insist, that a love to others was implanted to man. As the young Grotius said, in order to live by natural law in society man was given reason in the image of God. Thank to this gift of reason men could consent to natural law and the law of nations.

Grotius' voluntaristic conception of positive law as the lawgiver's will supplemented his intellectualistic notion of natural law as dictate of reason through the presumption that the common agreement reflected and enforced the dictate of the common reason. To Grotius the whole point of society was to protect men's rights.¹⁸ So, Grotius' *voluntaristic* laws (by common consent) had its *intellectualistic* explanation (in the law of nature). In a sense his *intellectualism* was Thomism upside down. It was, as if, Grotius attempted the inductive method of proof, where Aquinas attempted the deductive one.

In summary, Grotius had two answers to the question, 'Was the will of God free or under the dictate of His reason?'. The young Grotius affirmed the voluntaristic answer, while the mature Grotius affirmed the intellectualistic one. With respect to the question, 'What was the source of obligation under natural law?', Grotius failed to present the intellectualistic answer. Finally, he did not doubt that natural law was inherently rational: here his stance was of the convinced intellectualist.

¹⁸ In spite of Grotius' controversial acceptance of absolutism (Tierney, 1997, 335-7).

Appendix 1

Roman Law Concepts of Natural Law In Canon Law

This appendix describes the passage of the natural law concepts of Roman lawyers' into the body of the medieval canon and civil law. The focus will be on an unresolved contradiction within the Roman law understanding of the 'law of nature' and 'the law of nations', which (through canon law) passed into the Scholastic natural law. While the law of nature had connotations of the law of the original conditions, the law of nations was associated with the civilised human conditions. Were, then, the civilised conditions of mankind opposed to the original state of nature? Were servitude and private property against, or in accord with, nature? The Roman lawyers' divergent opinions on 'naturalness' of the civilised conditions provided the ground for the later conflicting views of *intellectualists* and *voluntarists*.

The Scholastic debates inherited a set of conflicting natural law definitions going back to the difference of opinions between the Roman lawyers Ulpian and Gaius. Ulpian shared a vision of natural law as a manifestation of natural inclinations, while Gaius reflected a view of natural law as right reason.

In the seventh century Isidore of Seville preserved some classical antiquity heritage in 15 volumes of his *Etymology*. The fifth volume (*De Legibus et Temporibus*) devoted to the discussion of the various laws, relied upon the Roman law sources. Gratian later used

Isidore's text in the first systematisation of canon law in his *Decretum* (1148). Gratian's *Decretum* (and the commentaries on it) became a source of the medieval references.¹

Gratian described the law of nature, as that contained in the Law and in the Gospels, by which each was ordered to do to another what he wished to be done to himself, and was prohibited from inflicting on another what he did not wish done to himself (Dec.d.1.int.). Gratian's synopsis of the law of nature went beyond the Roman law sources. It contained the early Christian Fathers vision of natural law as God's commandments, which was summing up as a general precept not to do to another what one did not wish done to himself.

In his classification of the laws, however, Gratian closely followed Isidore. Isidore distinguished between laws on the basis of the law-giver. Thus, the divine laws of nature were distinct from the human laws of customs (Et.5.2; Dec.d.1.c.1). Next, Isidore introduced the distinction of divine law from human law: To cross through another's field was divine law (*fas*), and not human law (*ius*) (Et.5.2; Dec.d.1.c.1). Human law (*ius*) consisted of the laws (*leges*, written decrees) and customs (*mos* or *consuetude*, common practices), which, in the absence of written law, became a law. Still, Isidore also saw a source of law in human reason (Et.5.3; Dec.d.1.c.5). In yet another sense, [human] law was either natural law (*ius naturale*), or the law of nations (*ius gentium*), or civil law (*ius civile*) (Et.5.4; Dec.d.1.c.6).

¹ Translated by Lewis E. in *Medieval Political Ideas*, 32-34.

Isidore's definition of natural law, which was adopted by Gratian, reflected the conflicting opinions of the different Roman lawyers. Natural law was, according to Isidore, a law common to all nations, which held everywhere, not by any enactment, but by the instinct of nature, such as, the union of man and woman, the generation and rearing of children, the common possession of all things and the one liberty of all men, the acquisition of those things which are taken from air and sky and sea; also, the restitution of an article given in trust or money loaned, and the repelling of force with force. For this, or whatever was similar to this, was never considered unjust, but natural and equitable (Et.5.4; Dec.d.1.c.7).

On one hand, Isidore followed the definition of Ulpian. Isidore, like Ulpian, contrasted the 'instinct of nature' with 'any enactment' (Carlyle 1,108-9). To Ulpian, natural law was that, which all animals had been taught by nature; this law was not peculiar to the human species, it was common to all animals. From it came the union of man and woman called by us matrimony, and therewith the procreation and rearing of children (Dig.1.1.1.3).² Ulpian was not alone among the Roman lawyers in defining the law of nature as a primitive law (in contrast to the law of nations as a law of civilised conditions). To Tryphoninus, liberty existed in virtue of natural law and command over men was by the Law of Nations (Dig. 2.12.6.64). However, Ulpian was probably exceptional in his assertion of primitive conditions, common to all animals, as a necessary characteristic of natural law. In contrast to Gaius, who did not clearly specify a term the 'law of nature', as distinct from the 'law of

² The *Digest of Justinian*, tr. by Ch. Monro vol.1 (bk 1-4), Cambridge 1904

nations', the law of nations was a law, which natural reason had laid down for mankind in general, being a law which all nations use (Dig.1.1.9).³

On the other hand, Isidore included in natural law, what Carlyle called 'an ethical habit', 'restitution of an article given in trust or money loaned', which presupposed private property, while private property and money had no place in Ulpian's natural law (Carlyle, 1, 108-9). To Tryphoninus, by contrast, the question of debt or no debt in connection with the right to bring *a condictio* [for money once paid] was related to the law of nature (Dig. 2.12.6.64).

The next part of Isidore's definition, concerning the naturalness of common possession as well as of initial acquisition of property, was possibly indebted to that of Marcianus (Carlyle 1,142-3). To Marcianus, some things, by the law of nature, were common to all, some belonged to community, and some to nobody, but most things belonged to individuals (Dig.1.8.2). To begin with, by the law of nature, the air, the flowing water, the sea, and consequently the seashore, were common to all (Dig.1.8.2). Marcianus, like Gaius, did not clearly distinguish between the law of nature and the law of nations and, therefore, looked at private property as primitive, rational and equitable (Carlyle 1, 52). To Gaius, natural reason admitted the title of the first occupant to that which previously had no owner (Inst.2.1.12). Another reference to private property as natural was provided by Florentinus, to whom pebbles, gems and things generally, which persons find on the shore, at once

³ Honore paid attention to the subtle distinction between the law of nature and the law of nations implied in the *Institutes* of Gaius 1.83 & 3.194. In Honore's view, the rules of the law of nations could be changed, in contrast to the immutable law of nature, although the change in question would pertain to the imposition of penalty rather than to the creation of a new species of wrong (Honore, 109-10).

became their own by the law of nature (Dig.1.8.3). Here Florentinus described ‘one of the forms of appropriation of things which were before nullius’ (in nobody’s possession) (Carlyle 1, 53).

Isidore’s inclusion in the law of nature of ‘repelling force by force’ was like Florentinus’ assertion of the justice (*ius*) of repelling violence and wrong by virtue of [natural] law, [because] whatever a man did in defence of his own person he did lawfully; nature having made men akin to one another, so it was a monstrous thing for one man to lie in wait for another (Dig.1.1.3). Florentinus defined liberty, in contrast to slavery, as a natural power of doing what anyone was disposed to do, save so far as a person was prevented by force or by law (Dig.1.5.4). The naturalness of liberty was too asserted by Tryphoninus (Dig.2.12.6.64).

Isidore’s concluding remarks about just and equitable character of the law of nature were in accord with Paulus’ vision of it (close to Gaius’ one) as applied to that, which was under all circumstances just and right (Dig.1.1.11).

In summary, natural law, to Ulpian, as well as to Gaius, was apposed to civil law as merely human enactment. In this sense in the state of nature originally everybody was free and equal. But Ulpian and Gaius differed on question as to what constituted natural law. To Ulpian, it was in the innate inclinations and shared by all animals, to Gaius it lay in innate reason and was confined to mankind.

In contrast to his definition of the law of nature, Isidore's definition of the law of nations was on the lines of enactments establishing the commonly accepted civilised institutions. In comparison, Ulpian defined the law of nations as a law, common not to all animated beings, but only to human beings in respect of their mutual relations (Dig.1.1.1.4). To Isidore, though, the law of nature already was a law of human relations, including ones presupposing property.

Isidore's definition of the law of nations resembled that of Hermogenianus. To Isidore, by the law of nations [which was used nearly by all nations] was the occupation of territory, building, fortifying, wars, captivities, slavery, rules of restoration, alliances of peace, armistices, the inviolability of ambassadors, the prohibition of marriage with an alien (Et.5.5;Dec.d.1.c.9). To Hermogenianus, likewise by the law of nations, war was introduced, nations were distinguished, kingdoms were established, ownership was ascertained, boundaries were set to domains, buildings were erected, mutual traffic, purchase and sale, letting and hiring and [many other] obligations in general set on foot (Dig.1.1.5).

It was rather a common view that slavery was a result of the law of nations. To Ulpian, slavery came through the law of nations (Dig.1.1.4). For Gaius, slaves were under *potestas* of their owners under the law of nations (Dig.1.1.6.1.1). Marcianus, likewise, considered that a slave could become an object of ownership by the law of nations, such as those who were captured from their enemies (Dig.1.5.5.1). However, since Gaius and Marcianus did not explicitly distinguish the law of nations from the law of nature, they understood slavery

as primitive and natural, even though they did not offer an explanation of the origin of slavery apart from its being connected with the war (Carlyle¹, 46). If repayment of force by force was permitted by natural law, there was already the possibility of captivity. The origin of slavery in captivity, as a preferential alternative to death, had been considered by Florentinus. Florentinus noted that military commanders, selling their captive as slaves, preserved them instead of killing them (Dig.1.5.4.2). Still Florentinus saw slavery as a creation of the law of nations, by which man was subject, contrary to nature, to ownership of part of another (Dig.1.5.4.1).

Ulpian, Tryphoninus and Florentinus, at the close of the second century, all saw men as born free and equal under the law of nature. Even Gaius or Marcianus did not consider slavery's origin akin to property. Gaius and Florentinus, though, saw private property as arising naturally, as being in nobody's possession. To Gaius, the origin of property was natural due to its inoffensiveness (no injury was done to anybody). By contrast, slavery had only one 'natural' origin, in the war. To injure another (without offence on his part) might be judged to be against the law of nature. Then, the use of force in self-defence might be seen in accordance with the law of nature. Hence, the capture of the attacker would be not against the law of nature. Although, the captivity, or slavery, itself would be hardly voluntary, it was a punishment. Unsurprisingly, Florentinus, to whom the repudiation of force by force was natural, nevertheless, contrasted slavery to liberty, because it was unnatural for man to be another's property.

Appendix 2

Canonic Natural Law: Rufinus

Gratian's *Decretum* immediately became a point of reference for the discussion of natural law. But besides such Roman law derived positions, commentators also drew on the early Christian thought. Here the contribution of Rufinus, in bringing into natural law debates the early Christian Fathers' legalistic intellectualistic vision of natural law, was far-reaching.

Rufinus, a canonist, studied at Bologna, and wrote (in 1170) a commentary to *Decretum*.⁴

In Part 1 Distinction 1 Rufinus provided his own discussion of natural law. He told a story of the loss of the original endowment with reason and justice as a result of the Fall, and its partial recovery through life in society.⁵ Since men's weakness [after the Fall] could not be transformed by merely means of life in society to the fullness of the original good God gave the Ten Commandments, which originally He had written on the hearts of men. Natural law was re-established through the Ten Commandments, but still not restored in all its fullness, because in them unlawful acts were altogether condemned, but not the will so to act (ibid).

⁴ The translation from *Medieval Political Ideas*, vol 1, 37-39.

⁵ As a result of the Fall the original endowments of rectitude of justice and clarity of knowledge were depressed. Yet the retained 'natural order' was imprinted on man's mind and differentiated him from the brute beast. And since the natural force deep within him had not been extinguished, he began to bestir, himself, that he might differ from the brute beast, as by his prerogative of knowledge and of living by law. Man then resolved to join and consult with his neighbours for mutual advantage, thus the sparks of justice appeared, as if from dying embers. These precepts of moderation and temperance, teaching men to change their rude and fierce ways to decent and honourable ones and to submit to bonds of concord and to make a fixed contract, were of the law of nations, because nearly all people used them

Rufinus distinguished the different parts of natural law. Natural law, thus, consisted of the commands of the good, such as, thou shalt love the Lord thy God; prohibitions of harm, such as , thou shalt not kill; and the indications of expediency, such as, let all good be held in common, or, let there be one liberty for all.

Rufinus, then, saw the custom as an inference from the expediency from the core natural law. Since natural law showed that one thing was by its nature right but another wrong, for the modification and adornment of natural law the manner and order of customs were added. For instance, the union of man and women belonged to natural law, but in order that men should not use that good thing casually like the beasts, it had been modified through the custom that only certain persons, and after a certain celebration of marriage, might be united (ibid.).

Rufinus' separation of 'indications' from commands and prohibitions opened the way to a wider definition of natural law. Thus, he resolved the Roman lawyers' dilemma to see some things, such as private property, as both unnatural and natural at the same time. There had been 'subtraction' from natural law, not in regard to the commands and prohibitions, but in regard to the 'indications' (those things, which nature neither forbade nor commanded, but showed to be good) and, especially, in regard to the one liberty of all men and common possession. For now, by civil law, this was my slave, that was your field. Yet all these things, seemingly contrary to natural law, were finally related to it. Rufinus saw servitude as a remedy for sin. Because certain men had begun to be unbridled, and to commit all conceivable crime with impunity, it was established that those who rebelled against

authority would be perpetually slaves (ibid.). The purpose [of the servitude] was [to make man] to shrink from pride and ill will and to prefer harmless and humility, and it belonged to natural law (ibid.).

Summary of Rufinus

Rufinus (in contrast to Ulpian) was concerned with natural law as ascribed to the human race alone. Rufinus was remarkably close to the early Christian Fathers' *legalist intellectualism* in his general vision of natural law, as originally given to men, then lost as a result of the original sin, and restored in the Old Testament Law, in order to be perfected in the Gospel. His understanding of natural law as an 'innate force' for doing good and avoiding evil, was also in line with Irenaeus' vision of natural law as a law of reason, implanted by God, which enable man to chose good and avoid evil. Rufinus also was influenced by anti-legalistic New Testament voluntarism (with its emphasis on the internal rather than external obedience). With Christ's new internal commandment the original natural law was at last restored.⁶

The vision of the law of nature as a law of reason was inherited by the early Fathers from the Stoics. The Stoic influence in the Canonical interpretation of *ius naturale*, as a force pervading the whole cosmos was noted by Tierney (Tierney, 1989, 632). Rufinus' certain force (*vis quedam*), in Tierney's view, were reminiscent of Cicero's *innata vis* (*De Inventione* 2.22.65) (id., 633). Tierney, though, conceded that the Stoic assertion of reason

as a natural force, by which man could discern the ‘objective’ law, pervading the whole universe, was not of the meaning of ‘subjective’ power [of free choice] (id., 635). Rufinus’ understanding of natural law was, moreover, too much in the line with the early Christian Fathers’ vision of it as a power of reason, by which good and evil were perceived as God’s Commandments (!), to fit Tierney’s ultimate interpretation of Rufinus’ natural law as ‘the licit free choice’.⁷

⁶ After the Fall man could only obey the law from self-love (through fear of punishment). But as Paul and Augustine only by God’s grace man could be transformed from self-love to God’s love, from life of flesh to life of the spirit. But in this case, a need for the Law, as a law of earthly life, would disappear.

⁷ Tierney himself argued that *ius naturale*, as divinely implanted power of reason, could be understood as natural law, just as well as natural right, and, while ‘the twelfth-century canonists often suggested a definition of *ius naturale* as human freewill’, ‘they commonly rejected the identification because the will could choose good or evil while *ius* implied a choice of the good’ (Tierney, 1983, 438-439).

Appendix 3

Medieval Development of the Roman Law Notion of *Dominium*

The purpose of this appendix will be to outline the genesis of the medieval transformation of the Roman law notion of *dominium*. Aside from the notion of the law of nature, yet another important Roman law inheritance lay in the notion of *dominium*. The importance of this notion was strengthened by the use in Jerome's Vulgate translation of the Old Testament of the term *dominium*, as natural endowment of man in the image of God. The *intellectualists* and *voluntarists* used the Old Testament notion of original *dominium* in the discussion of the state of nature, which resulted in the development of the notion of natural right as the original *dominium* given to man in the image of God. These debates led to the eventual understanding the original *dominium* being an original endowment of man in the image of God as natural right (*ius naturale*).

The medieval notion of *dominium* in contrast to Roman law came to denote not only a claim to full possession, but also a claim to (various) uses of the thing. Thus, the new medieval usage opened the door for the voluntarists, like Ockham, to redefined concept of the original *dominium* as a non-possessive endowment of man in the state of nature.

In spite of the presence of notions of *dominium* (ownership) and *ius* (benefit, claim) the Roman law did not possess a clear concept of 'right' (Tuck,13). In the Roman law *dominium*

denoted a (corporeal) claim (*in rem*) of the full ownership of the thing, as a full enjoyment of possession, including its alienation at will (Hunter, 394). In the Roman law, the things (as subject of law) were divided on corporeal (*res corporals*), which could be handled, and incorporeal (*res incorporals*), consisted of incorporeal (personal) benefits (*ius*) (Gaus, Dig. I.8.1.1). To have *ius* originally meant to benefit from an agreement which laid obligation on the another party (Tuck, 9). *Ius in personam (ad rem)*, or personal *servitudes*, was obligation (laid on another party) that did not give claim in the thing (*in rem*), but did bind another to do or to give something (Hunter, 451).⁸ So to have *dominium* was to have a total control over the corporeal thing, while to have *servitudes*, or *ius*, was to have some particular claim not upon the thing but against the owner the things.

This Roman law meaning of *dominium* as a power of full control over the external things was reinforced by the Old Testament meaning of the original *dominium* given man over the things and over the other creatures.

The new conditions of the medieval feudalism led to the development of a hierarchical notion of *dominium*, not only of the full control, but also as a ‘bunch’ of claims, thus leading to the synthesis of the meaning of *dominium* with the meaning of *ius*. Towards the mid-thirteen century the medieval civil lawyers distinguished between *dominium directum* of the lord, and *dominium utile* of the vassal, who controlled the land in fact (Feenstra R., in *New perspectives in the Roman Law of Property*, 112-113). In the fourteen century Bartolus (1314 – 57), while preserving the notion of one ultimate direct *dominium*, noted that there

⁸ The examples of the *ius in personam* were *usufructus* (near full use of thing without ability to pass it to heir (Inst. 2.4), *usus* (the use of things belonging to another, without destroying their substance: Inst. 2.1-4),

could be as many *dominium* in use as there were uses of the thing. (MPI, 91).⁹ In his *De Acquirendi Possessione* he used ‘*dominium*’ to cover broad incorporeal claims (*ius*), like *dominium* of some obligation as usufruct (MPI, 337, n.5).¹⁰

Thus, through the medieval development ‘*dominium*’ became a claim (*ius*), or a ‘right’, to (some) use of thing. To have a claim to use of thing became to have (some) *dominium* in it.

The interest to the notions of *dominium* and *ius utile* reignited through the fourteen century debates about so called Apostolical Poverty, initiated by the Franciscan Order.

The Franciscans claimed that they used things without having possessive *dominium*. Thus, the legally significant possessive relationship, such as *dominium*, *usefructus*, *ius utendi*, being all, in a sense, the relationships of *dominium*, were contrasted to a simple ‘use of fact’. In creating this notion of the simple use of the things, the Franciscans appealed to natural law, where, in the primeval state, all things were common to all men and, hence, were used without having exclusive ‘*dominium*’. Thus, the simple use of fact was akin to the horse’s use of the oat for subsistence without ‘possession’ of it, or, for that matter, the Franciscans’ use the things necessary for subsistence without having possession of them.

habitatio (the benefit of occupying a house belonging to another; Inst.2.5.).

⁹ Joannes Faber, the civil lawyer of the fourteen century, elaborated the theory of divided *dominium* to accommodate the hierarchical feudal system, where the vassal, subinfeudating his holding, in relation to his lord, would still having *dominium* of use, while in relation to his own vassal now would have direct *dominium*... (MPI, 337-338, note 6).

¹⁰ Bartolus’ pupil Baldus thus listed *dominium* as one of *ius reale* (*ius in re*, a restricted claim over another’s man property) (Feenstra, 111-3).

As a result of this debate, the whole notion of the original *dominium* was re-examined. The Franciscians ultimately failed to redefine the (natural) simple use as a (natural) 'right', unconnected to the notion of (original) *dominium*. The outcome was a new notion of 'natural right' as bestowed through the original *dominium* on man in a virtue of made with reason in the image of God.